

**ORIGINAL**

FILED  
DISTRICT OF WYOMING  
CHEYENNE  
'03 NOV 25 PM 2 41

KAREN BUDD-FALEN  
Budd-Falen Law Offices, L.L.C.  
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Cheyenne, Wyoming 82003  
(307)632-5105

CLERK  
U.S. DISTRICT COURT

Attorney for Plaintiff

**UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF WYOMING**

HARVEY FRANK ROBBINS, and the )  
HIGH ISLAND RANCH and CATTLE )  
COMPANY )

Plaintiff, )

vs. )

Case No.03 CV 230 D

UNITED STATES BUREAU OF LAND )  
MANAGEMENT, an Agency of the )  
United States Department of the Interior; )  
GALE NORTON, in her official capacity as )  
Secretary of the United States Department )  
of the Interior; KATHLEEN CLARKE, )  
in her official capacity as Director of )  
Bureau of Land Management; BOB )  
BENNETT, in his official capacity as )  
Director of Wyoming State Bureau of Land )  
Management; DARRELL BARNES, )  
in his official capacity as Field Manager of )  
the Worland Field Office for the Bureau of )  
Land Management )

Defendants. )

**MOTION TO COMPEL PRODUCTION  
OF DOCUMENTS AND ENJOIN  
DEFENDANTS FROM WITHHOLDING  
DOCUMENTS**

\*\*\*\*\*

COMES NOW the Plaintiff, and hereby requests this Court compel the Defendants to produce documents in compliance with the Plaintiff's multiple Freedom of Information Act ("FOIA") requests or, in the alternate, to expedite review of this case. In support of the motion, the Plaintiff states as follows:

# **I. FACTS**

The Plaintiff, Harvey Frank Robbins, has been involved in litigation with employees of the Worland, Wyoming Office of the Bureau of Land Management ("BLM") since 1998. In this current lawsuit captioned above, Mr. Robbins seeks to compel the production of documents that the BLM has withheld in violation of the FOIA. From February 17, 2003 to October 3, 2003, Mr. Robbins has made a total of ten FOIA requests to the BLM; nine of these requests were made to the BLM Worland Field Office and one request was made to the Wyoming State BLM Office. See FOIA requests, attached as Exhibits 1 through 10 hereto. As stated in the Plaintiff's Complaint, the Worland BLM has not responded to seven of these ten requests. See Declaration of Kuhl, attached as Exhibit 11 hereto.

Although the BLM has responded to the remaining three requests, those responses were far from accurate. Regarding the February 17, 2003 request, the Worland BLM initially responded on April 3, 2003, stating that it would not respond unless Mr. Robbins remitted a check for \$16,624.20. See BLM response, attached as Exhibit 12 hereto. Only after counsel for the Plaintiff requested documentation to support the BLM's claim of search time did the BLM

substantively respond to the FOIA request. That response was dated June 22, 2003, more than four months after the initial request and the documents were provided free of charge. See BLM response, attached as Exhibit 13 hereto. In that response, while the Worland BLM provided some documents, others were withheld as being exempt under exemption 5 of the FOIA. Id.

The BLM responded on August 22, 2003 to Mr. Robbins' July 1, 2003 FOIA request. See letter with attachments, attached as Exhibit 14 hereto. Again, the Worland BLM cited to exemption 5 of the FOIA as justification for denying or redacting most of the information requested by Mr. Robbins. Id. Curiously, six days later (August 28, 2003), a portion of the information denied to Mr. Robbins was attached to a letter sent by the advocacy group Public Employees for Environmental Responsibility ("PEER") to the Inspector General complaining about Mr. Robbins. Id. Defendant Darrell Barnes, who is in charge of all operations and management of the Worland BLM, claims that he does not know how these redacted documents were obtained by PEER to be used against Mr. Robbins. See Deposition Excerpt attached as Exhibit 15 hereto. While characterizing the PEER documents as "improper . . . leaks," Defendant Barnes refused to investigate the source of the leaks, characterizing any such investigation as a "witch-hunt." Id.

On November 18, 2003, after this Complaint was filed, the Wyoming State BLM Office partially responded to Mr. Robbins' FOIA request dated September 19, 2003. See BLM Response attached as Exhibit 16 hereto. Although this response admittedly contains some

responsive materials, the response fails to provide any timeframe for supplying the documents responsive to the remainder of the FOIA request. Id.

Mr. Robbins has also attempted to obtain many of these documents through routine discovery in a separate federal court action. See Individual Defendants Response to Plaintiff's Motion to Compel Production of (Agency) Documents, attached as Exhibit 17 hereto. In that separate action, the Defendant Worland BLM employees argue that they do not have to produce these documents through discovery, because the proper way to get BLM documents is through the FOIA. Id. at 2, 7-8.

This is not the first time the Plaintiff has had to force the Worland BLM to comply with FOIA. Previously, Mr. Robbins had exercised his right to appeal, through the BLM's administrative appeals process over 30 adverse decisions issued by the Worland BLM against him. See Administrative Hearing Transcript Cover Pages, attached as Exhibit 18 hereto; Order On Application for an Award of Attorneys Fees and Costs, attached as Exhibit 19 hereto. As part of that process, a number of those administrative appeals were consolidated and set for hearing from May 15 through May 18, 2001. Id. At the end of the day on May 18, 2001, this administrative hearing was continued until September 25, 2001.

After Part I (i.e. May 15-18, 2001) of Mr. Robbins' consolidated administrative hearing, Mr. Robbins began preparations for Part II set to begin in September, 2001. His preparations included making several FOIA requests to the Worland BLM, requesting documents related to

issues raised by the BLM for the first time in Part I of the administrative hearing. By law and as in this case, the BLM had to respond to those FOIA requests within 20 days. 5 U.S.C. § 552(a). The Worland BLM completely failed to respond to six of these requests. Id. Based on this failure, on September 5, 2001, Mr. Robbins was forced to file a complaint with this Court seeking to force the Worland BLM to comply with its statutory obligations. Id. Mr. Robbins' complaint forced the Worland BLM to comply, but not in time for Mr. Robbins to complete preparations for Part II of his administrative hearing. As explained by this Court:

On September 5, 2001, after the BLM failed to respond to any of the six FOIA requests, the Plaintiff filed a complaint, pursuant to 5 U.S.C. § 552(a)(4)(B), to compel the BLM to comply with the requests. After this litigation was filed, the BLM finally decided to respond to the Plaintiff's requests. Curiously, the Plaintiff's attorneys received the BLM's FOIA responses on the very day that the trial for which some of the information was being sought began.

See Harvey Frank Robbins v. Bureau of Land Management, Civ. No. 01-CV-158D, attached as Exhibit 19 at 2. Thus, the Worland BLM's gross failure to comply with the mandatory requirements of the FOIA harmed Mr. Robbins' ability to defend himself against adverse decisions issued by the Worland BLM against Mr. Robbins.

Mr. Robbins subsequently filed for an award of attorneys fees. Exhibit 19. This Court held that, because the BLM ultimately complied with Mr. Robbins' FOIA requests, and pursuant to the newly decided Supreme Court decision in Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598 (2001), Mr. Robbins was not

entitled to attorneys fees. Nevertheless, this Court had strong words for the Worland BLM's apparent bad faith:

This result should not be interpreted as a condoning of the BLM's conduct in this matter. Arrogance of authority, and indifference to citizens' legitimate interests, even the appearance of such vices, should be avoided by public servants. The BLM's conduct in this matter is troubling to this Court and it will not soon be forgotten. A matter of this nature involving this agency should not appear on my desk again.

Exhibit 19 at 5. Unfortunately, the Worland BLM has now disregarded this Court's order by doing the *exact same thing*.

## II. ARGUMENT

The FOIA is a disclosure statute. “[FOIA] reflect[s] a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.” John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989). “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against the corruption and to hold the governors accountable to the governed.” NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).

Under the FOIA, “each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.” 4 U.S.C. ¶ 552(a)(3). The FOIA provides that “[e]ach agency, upon request for records made . . . shall . . . determine within 20 days (excepting Saturdays, Sundays, and legal public

holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore . . . .” 5 U.S.C. § 552(a)(6)(A)(i). The BLM regulation shortens the applicable time frame, requiring the BLM to respond within ten days. 43 C.F.R. § 2.17.

All ten of the FOIA records requested between February 17, 2003 and October 3, 2003 included in the complaint were reasonably identified and made in accordance with the applicable FOIA procedures. Exhibits 1-10. All ten requests were sent via certified mail to either the Worland Field Office or to the Wyoming State Office of the BLM. Id. The BLM has not responded to seven of the ten requests. Exhibit 11. The BLM only partially responded to three of the requests, claiming the records were exempt yet providing no underlying rationale for the exemption beyond conclusory statements. Exhibits 13-14. In one instance, the BLM also stated the Office of the Regional Solicitor must review the request, yet establishes no timeframe within which the records will be released. Exhibit 16. As in 2001, the BLM is clearly and unequivocally in direct violation of the FOIA. Most of Mr. Robbins' FOIA requests are many months overdue the statutory limit.

Moreover, the facts and circumstances clearly indicate that the Worland BLM is ignoring or abusing the FOIA process in an attempt to chill Mr. Robbins' lawful attempt to prepare for a trial against individual Worland BLM employees in his separate litigation (Robbins v. Wilkie et al., Civ. No. 98-CV-201B), just as they did in the administrative hearing process in 2001. These

Worland BLM employees argue that they do not have to give Mr. Robbins documents through discovery because he can and must get them through FOIA, yet the Worland BLM has consistently refused to provide the same documents through the FOIA, see Exhibit 17, and in most cases has refused to even answer Mr. Robbins' FOIA requests.

The Worland BLM has also denied Mr. Robbins documents under exemption 5 of the FOIA, while at the same time “leaking” the same documents to an advocacy group who is opposed to Mr. Robbins. Because the FOIA is a full disclosure statute, exemptions from compelled disclosure under the FOIA are to be narrowly construed. Dept. of Air Force v. Rose, 425 U.S. 352, 361 (1976); Herrick v. Garvey, 298 F.3d 1184, 1189 (10<sup>th</sup> Cir., 2002). The burden is on the agency to justify the exemption. Herrick, 298 F.3d at 1189. To satisfy its initial burden under the Act, the agency “must provide a detailed analysis of the requested documents and the reasons for invoking the particular exemption.” Johnson v. United States Dep’t of Justice, 739 F.2d 1514, 1516 (10<sup>th</sup> Cir. 1984) overruled on other grounds Hale v. United States Dep’t of Justice, 2 F.3d 1055 (10<sup>th</sup> Cir. 1993).

Exemption 5 exempts from mandatory disclosure matters that are “inter-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). To qualify for this exemption, the document must meet two conditions: (1) its source must be a government agency; and (2) it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency. Dept. Of Interior and Bureau of Indian Affairs v. Klamath Water Users



Protective Ass'n, 532 U.S. 1, 2 (2001). When claiming “deliberative process” privilege, the Court will look at two factors to determine whether the privilege applies. The court looks at “the nature of the decision making authority vested in the officer or person issuing the disputed document” and “the relative positions in the agency’s ‘chain of command’ occupied by the documents’ author and recipient.” Casad v. United States Dep’t of Health & Human Svcs, 301 F.3d 1247, 1252 (10<sup>th</sup> Cir. 2002). The Attorney Client Privilege is a civil discovery privilege that has been incorporated into exemption 5. NRLB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). Therefore, only those documents that would normally be privileged in the civil discovery context are exempt. Where the documents would be “routinely or normally disclosed upon a showing of relevance,” the exemption does not apply. Federal Trade Comm’n v. Grolier, 462 U.S. 19, 26 (1983).

Providing a list of documents withheld and a citation to a claimed exemption, without more, is clearly insufficient to meet the BLM’s burden of proof. In fact in many cases, the BLM did not even provide a list of documents that were withheld. See e.g. Exhibit 13. The BLM has failed to support its exemption 5 claim on any of the standards or rationales as described above, and therefore should be ordered to produce the requested documents or provide an adequate rationale for the denial.

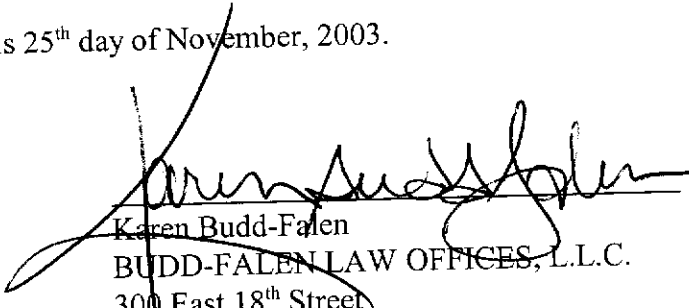
### III. CONCLUSION

The Worland BLM has clearly ignored this Court’s stern warning that it should comply with the FOIA. See Exhibit 18, p. 5. The Defendants are abusing their positions of authority as

BLM employees to prevent Mr. Robbins from timely obtaining agency documents which bolster his lawsuit against these same employees, just as they did in 2001. The Defendants have, in seven instances, failed to respond to the Plaintiff's FOIA requests in any manner. In three instances, the Defendants have either arbitrarily denied agency records to the Plaintiff while providing substantially similar information to third parties or have denied agency records based on conclusory statements of exemption without providing any underlying rationale.

WHEREFORE, Mr. Robbins respectfully requests immediate relief in this matter. In the alternate, Mr. Robbins respectfully requests that this Court expedite review of this case.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of November, 2003.



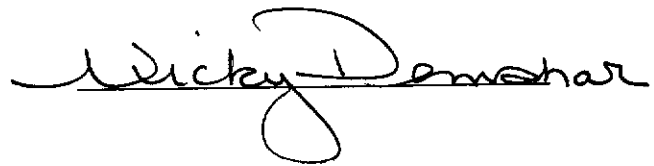
Karen Budd-Falen  
BUDD-FALEN LAW OFFICES, L.L.C.  
300 East 18<sup>th</sup> Street  
Post Office Box 346  
Cheyenne, Wyoming 82003-0346  
(307) 632-5105 Telephone  
(307) 637-3891 Telecopier

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I caused a true and correct copy of the foregoing to be deposited in the United States Mail this 25<sup>th</sup> day of November, 2003, to the following:

U.S. Attorney  
2120 Capitol Avenue, Room 4002  
Post Office Box 668  
Cheyenne, WY 82003

U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington D.C. 20530-0001

A handwritten signature in black ink, reading "Wicky Demohar". The signature is written in a cursive style with a large, looping "D" and a long horizontal stroke extending to the left.

# *Budd-Falen Law Offices, P.C.*

Karen Budd-Falen<sup>1</sup>  
Franklin J. Falen<sup>1</sup>  
Marc R. Stimpert<sup>1,2</sup>  
Richard W. Walden<sup>1,2,4</sup>  
Brandon L. Jensen<sup>1,3</sup>  
Richard M. AuBuchon<sup>1</sup>  
Robert D. Singletary<sup>1,2</sup>  
Lloyd D. Rickenbach<sup>5</sup>

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<sup>1</sup>admitted in Wyoming  
<sup>2</sup>admitted in Oklahoma  
<sup>3</sup>admitted in Colorado  
<sup>4</sup>admitted in California  
<sup>5</sup>admitted in Utah

February 17, 2003

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**  
**7002 0860 0007 6295 4796**

FOIA Officer  
Bureau of Land Management  
Worland Field Office  
101 South 23<sup>rd</sup>  
PO Box 119  
Worland, WY 82401-0119

Re: Freedom of Information Act Request

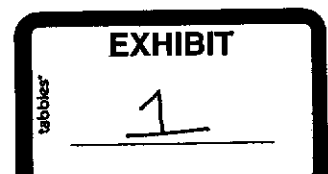
Dear FOIA Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, on behalf of Frank Robbins, I request the following information:

1. All telephone records, telephone logs, conversation notes and emails from any telephone or computer used for office business for or from the following Bureau of Land Management ("BLM") employees from January 1, 2003 to the present:

Roger Bankert  
Jim Roseberry  
Chet Wheelless  
Lin Cannella  
Dallas Heller  
Greg Berry  
Darrell Barnes  
Tim Stevens  
Roger Inman

Tom Ball  
Destin Harrell  
Bryan McKenzie  
Jim Wolf  
Teryl Shryack  
Nancy Baker  
Bob Gate



2. I request a copy of all FOIA requests sent to the Worland BLM Office from January 1, 2003 to the present.

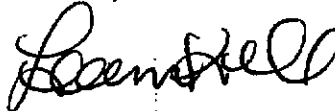
3. I request a copy of all notes, meeting minutes, correspondence or any other documents including any agendas or briefing papers relating to or generated from the Interagency Coordination Group meeting held on January 31, 2003 from 9:00am to 3:30 p.m. at the Worland BLM Office.

This information should not be subject to the Freedom of Information Act exemptions and access to the requested documents should be granted within twenty (20) working days. If you determine that some of the information requested is exempt from FOIA, that this information be identified by document, along with the statutory basis for your claim and your reasons for not exercising your discretion to release this information. FOIA also provides that if only portions of the file are exempt from release, the remainder of the file must be released. Therefore, we request that we be provided with all non-exempt portions that can reasonably be segregated.

If there is any problem in providing this information, please let me know so that further arrangements can be made.

Thank you for your cooperation.

Sincerely,



Leann M. Kuhl

Paralegal

BUDD-FALEN LAW OFFICES, P.C.

KBF:lmk

xc: Frank Robbins

Karen Budd-Falen<sup>1</sup>  
Franklin J. Falen<sup>1</sup>  
Marc R. Stimpert<sup>1,2</sup>  
Richard W. Walden<sup>1,2,4</sup>  
Brandon L. Jensen<sup>1,3</sup>  
Richard M. AuBuchon<sup>1</sup>  
Robert D. Singletary<sup>1,2</sup>  
Lloyd D. Rickenbach<sup>1,5</sup>  
Karen L. Spinola<sup>1</sup>

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<sup>1</sup>admitted in Wyoming  
<sup>2</sup>admitted in Oklahoma  
<sup>3</sup>admitted in Colorado  
<sup>4</sup>admitted in California  
<sup>5</sup>admitted in Utah

July 1, 2003

**VIA CERTIFIED MAIL/  
RETURN RECEIPT**  
7002 0860 0007 6297 7894

Margy Tidemann, FOIA Coordinator  
Bureau of Land Management  
Worland Field Office  
P.O. Box 119  
Worland, WY 82401-0119

Re: Freedom of Information Act

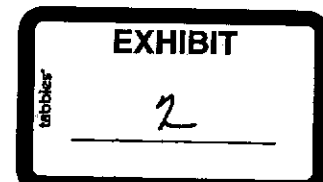
Dear Ms. Tidemann,

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, on behalf of Frank Robbins, I request the following information:

On Sunday, June 22, 2003, an article appeared on the front page of the Casper Star Tribune entitled, "Top Interior officials impose settlement." This article contains certain statements which are repeated below. It is the information upon which these statements were based or may have been based that is requested through this FOIA. The information requested through FOIA includes BOTH (1) any files, documents and other information given to the Casper Star Tribune or any employee of that newspaper, regarding Frank Robbins or any of his operations, at any time and (2) any files, documents and information upon which any statements by any BLM employees appearing in the June 22, 2003 article were based. The statements in the Casper Star Tribune article are as follows:

1. According to the continuation of the article on page A4, column 1, ¶ 4, "BLM files are filled with complaints about Robbins and his operations, including cattle trespassing on the private property of neighbors; trespassing on BLM grazing allotments that belonged to neighbors; trespassing

Page 1 of 3



too soon, to late or too many cattle on BLM grazing allotments; trespassing on resting BLM grazing allotments; blocking a neighbor's use of a cattle drive trail with a locked gate; claiming cattle were on private pasture when they were on BLM pastures; and refusing to obtain required recreation permits for dude ranch trail drives over BLM lands."

2. Page A4, column 1, ¶5 "In the midst of the deepening Wyoming drought, Worland officials asked ranchers to reduce herd size or change grazing patterns to reduce damage to the dry rangeland -- a request essentially ignored by Robbins."

3. Page A4, column 2, ¶1, "BLM records show that because of continuing violations, Worland officials refused Robbins' request for a grazing permit on the newly purchased Owl Creek ranch and also canceled Robbins' grazing permits on his two other ranches (later stayed for judicial review) and were actively contemplating seizure of Robbins' livestock."

4. Page A4, column 3, ¶1, "According to Dave Wallace, supervisory range conservationist, Worland has sent about a dozen issues to Cheyenne. Some issues have expired, others have been worked through, but still others are unresolved; Wallace said."

5. Page 4A, column 4, ¶ 2, " Ruch said the BLM's own fact-finding team determined that Worland staff were behaving professionally and properly in their dealings with Robbins."

This information should not be subject to the Freedom of Information Act exemptions and access to the requested documents should be granted within twenty (20) working days. If you determine that some of the information requested is exempt from FOIA, that this information be identified by document, along with the statutory basis for your claim and your reasons for not exercising your discretion to release this information. FOIA also provides that if only portions of the file are exempt from release, the remainder of the file must be released. Therefore, we request that we be provided with all non-exempt portions that can reasonably be segregated.

If there is any problem in providing this information, please contact myself or Leann Kuhl with my office at the number above.

Thank you for your cooperation.

Sincerely,

/s/

Karen Budd-Falen  
BUDD-FALEN LAW OFFICES, P.C.

*Budd-Falen Law*

Karen Budd-Falen<sup>1</sup>  
 Franklin J. Falen<sup>1</sup>  
 Marc R. Stimpert<sup>1,2</sup>  
 Richard W. Walden<sup>1,2,4</sup>  
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 Lloyd D. Rickenbach<sup>5</sup>

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 Telephone 307/637-2222  
 Telefax 307/637-2222  
 E-Mail main@buddfa  
 Website www.buddfa

June 13, 2003

VIA TELEFAX

307/347-5228

CERTIFIED MAIL &  
RETURN RECEIPT

7002 0860 0007 6297 8426

FOIA Officer  
 Bureau of Land Management  
 Worland Field Office  
 P.O. Box 119  
 Worland, WY 82401-0119

Re: Freedom of Information Act Request

Dear Sir:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, on behalf of Frank Robbins and the High Island Ranch, this letter requests the following information:

1. Any and all information, including but not limited to: all letters, documents, "internal memorandum" and all other documents provided to the Billings Gazette or the Casper Star Tribune regarding Frank Robbins, the High Island Ranch, the HD Ranch or the Owl Creek permit transfer or any settlement agreement involving any of these entities.
2. All documents referenced in the Billings Gazette article dated June 13, 2003. This information includes, but is not limited to the (1) "internal memo to the BLM state director in March, 2002"; (2) "internal documents" that claim that the BLM "fielded calls from neighbors that Robbins was running his cows on certain land without authorization;" (3) "government documents" that state that BLM has issued 8 nonwilful trespass violations, four wilful trespass violations and 13 repeated wilful trespass violations involving about 151 animal unit months;" (4) the "Barnes memo" regarding

EXHIBIT

3



June 13, 2003

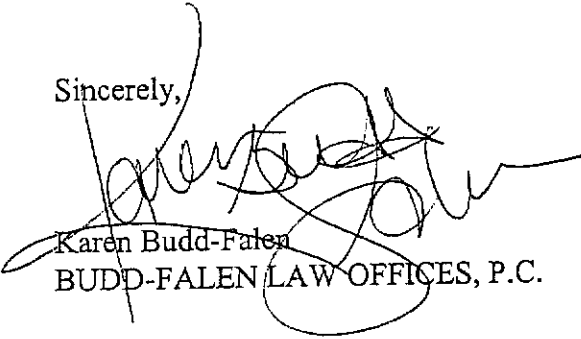
Page 2

Robbins' alleged unsatisfactory performance record; (5) documents regarding alleged continued problems during the period the parties were negotiating the settlement; (6) the "internal memo" containing "eight pages documenting several points on which the [settlement] agreement seems to violate federal law, significantly altering the Taylor Grazing Act, the Federal Land Policy and Management Act, the Federal Committee Advisory Act and the Code of Federal Regulation;" and (7) "internal notes" regarding a meeting between Robbins and Alan Kesterkee. See attached Billings Gazette Article Dated June 13, 2003.

This information should not be subject to the FOIA exemptions and access to the requested documents should be granted within twenty (20) working days.

If the BLM determines that some of the information requested is exempt from FOIA, that information should be identified by recording or document, along with the statutory basis for the exemption claim and the reasons for not exercising your discretion to release the information. FOIA also provides that if only portions of the requested information are exempt from release, the remainder must be released. Therefore, I request that I be provided with all nonexempt portions that can be segregated.

Sincerely,

  
Karen Budd-Falen  
BUDD-FALEN LAW OFFICES, P.C.

KBF:ha

xc: Frank Robbins - via fax (307) 867-5308  
Tom French - via fax (970) 482-3148  
Bob Bennett - via fax (307) 775-6256  
Alan Kesterkee - via fax (307) 775-6256  
Fran Cherry - via fax (202) 208-5242

*Budd-Falen Law*

Karen Budd-Falen<sup>1</sup>  
 Franklin J. Falen<sup>1</sup>  
 Marc R. Stimpert<sup>1,2</sup>  
 Richard W. Walden<sup>1,2,4</sup>  
 Brandon L. Jensen<sup>1,3</sup>  
 Richard M. AuBuchon<sup>1</sup>  
 Robert D. Singletary<sup>1,2</sup>  
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 Telefax 307/637-3891  
 E-Mail main@buddfalen.com  
 Website www.buddfalen.com

July 16, 2003

**CERTIFIED MAIL/**  
**RETURN RECEIPT REQUESTED**  
 7002 0860 0007 6297 7948

FOIA Officer  
 Bureau of Land Management  
 Worland Field Office  
 101 South 23<sup>rd</sup>  
 PO Box 119  
 Worland, WY 82401-0119

Re: Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, on behalf of Frank Robbins, I request the you mail to my office all materials and documents supporting the following two quotes from the Western Livestock Journal, July 7, 2003:

1. "Wallace said they were handed the Department of Interior settlement and issued a permit to graze one of the ranches on April 26, but the rancher admits he was out there grazing it a week prior. The BLM is also concerned they no longer have authority to do anything about grazing violations, because they have to go through the director's designee, according to the settlement. What they can do is give the Directors designee monitoring information".
2. Quoting David Wallace, "This settlement deviates from that whole process because now we have to go through an extra step before we can go out and monitor public lands".

U.S. Postal Service CERTIFIED MAIL RECEIPT (Domestic Mail Only; No Insurance Coverage Provided)	
OFFICIAL USE	
Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$
Postmark Here	
Sent to Worland BLM	
City, State, ZIP+4 Worland, WY 82401	
Post Office Box No. 101 South 23rd	
PS Form 3800, April 2002	

EXHIBIT

4

This information should not be subject to the Freedom of Information Act exemptions and access to the requested documents should be granted within twenty (20) working days. If you determine that some of the information requested is exempt from FOIA, that this information be identified by document, along with the statutory basis for your claim and your reasons for not exercising your discretion to release this information. FOIA also provides that if only portions of the file are exempt from release, the remainder of the file must be released. Therefore, we request that we be provided with all non-exempt portions that can reasonably be segregated.

If there is any problem in providing this information, please let me know so that further arrangements can be made.

Thank you for your cooperation.

Sincerely,



Karen Budd-Falen  
BUDD-FALEN LAW OFFICES, P.C.

KBF:lmk

xc: Frank Robbins  
Tom French  
Cindy Wertz

Karen Budd-Falen<sup>1</sup>  
Franklin J. Falen<sup>1</sup>  
Marc R. Stimpert<sup>1,2</sup>  
Richard W. Walden<sup>1,2,4</sup>  
Brandon L. Jensen<sup>1,3</sup>  
Richard M. AuBuchon<sup>1</sup>  
Robert D. Singletary<sup>1,2</sup>  
Lloyd D. Rickenbach<sup>5</sup>

300 East 18th Street  
Post Office Box 346  
Cheyenne, Wyoming 82003-0346  
Telephone 307/632-5105  
Telefax 307/637-3891  
E-Mail [main@buddfalen.com](mailto:main@buddfalen.com)  
Website [www.buddfalen.com](http://www.buddfalen.com)

July 17, 2003

**U.S. Postal Service**  
**CERTIFIED MAIL RECEIPT**  
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<b>OFFICIAL</b>	
Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

# 0000002987      Postmark  
 JUL 7 03  
 EVANSTON IL

Sent \_\_\_\_\_  
 Recipient's Apt. No.;  
 Box No.  
 City, State, ZIP+4

Wardlaw Ave  
 253419  
 POSTAL 253419  
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 U.S. POSTAGE

**CERTIFIED MAIL**  
**/RETURN RECEIPT REQUESTED**  
**7002 0860 0007 6297 7955**

FOIA Officer  
Bureau of Land Management  
Worland Field Office  
101 South 23<sup>rd</sup>  
PO Box 119  
Worland, WY 82401-0119

Re: Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, on behalf of Frank Robbins, I request the you mail to my office all BLM field notes, maps, technical reports, other written notes, photographs, and all other documentation relating to two April 2002 allotment evaluations for allotments authorized to Frank Robbins. I would also like a copy of the "Determination Report or Reports" written by the BLM based upon the April 2002 allotment evaluations.

This information should not be subject to the Freedom of Information Act exemptions and access to the requested documents should be granted within twenty (20) working days. If you determine that some of the information requested is exempt from FOIA, that this information be identified by document, along with the statutory basis for your claim and your reasons for not exercising your discretion to release this information. FOIA also provides that if only portions of the file are exempt from release, the remainder of the file must be released. Therefore, we request that we be provided with all non-exempt portions that can reasonably be segregated.

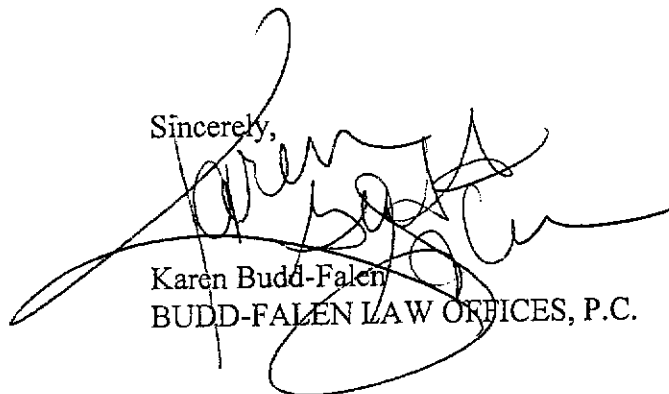
**EXHIBIT**

5

If there is any problem in providing this information, please contact Leann Kuhl with my office, so that further arrangements can be made.

Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Karen Budd-Falen', is written over the typed name and firm name.

Karen Budd-Falen  
BUDD-FALEN LAW OFFICES, P.C.

KBF:lmk

xc: Frank Robbins

Karen Budd-Falen<sup>1</sup>  
Franklin J. Falen<sup>1</sup>  
Marc R. Stimpert<sup>1,2</sup>  
Richard W. Walden<sup>1,2,4</sup>  
Brandon L. Jensen<sup>1,3</sup>  
Richard M. AuBuchon<sup>1</sup>  
Robert D. Singletary<sup>1,2</sup>  
Lloyd D. Rickenbach<sup>5</sup>

300 East 18th Street  
Post Office Box 34  
Cheyenne, Wyoming 82001  
Telephone 307/632-5000  
Telefax 307/637-3800  
E-Mail main@buddfalen.com  
Website www.buddfalen.com

July 21, 2003

VIA U.S. MAIL  
CERTIFIED/RETURN RECEIPT  
7000 0860 0007 6297 8532

Bureau of Land Management  
FOIA Officer  
Worland District Office  
P.O. Box 119  
Worland, Wyoming 82410

Re: Freedom of Information Act Request

Dear Sir:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, I request that I receive the following:

1. All documentation, photographs, e-mail documents, telephone notes, letters or any other documentation issued to or received from the Humane Society regarding any allegation or investigation of animal cruelty by Frank Robbins
2. All e-mail documents, on any computer from any BLM employee pertaining to Frank Robbins, the High Island or HD Ranches from May 22, 2001 to the present.
3. All documentation, e-mail documents, telephone notes, letters or any other documentation sent from or received by any employee in the Worland Office to or from the following organizations:
  - a. Western Watersheds Project and/or John Marvel
  - b. PEER
  - c. Center for Biological Diversity
  - d. National Wildlife Federation
  - e. National Resources Defense Council and/or Johanna Wald

U.S. Postal Service  
CERTIFIED MAIL RECEIPT  
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Postage \$  
Certified Fee \$  
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Total Postage & Fees \$

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U.S. POSTAGE

Postmark: JUL 21 2003

State: WY Zip: 82410

Form 3800, April 2002 See Reverse for Instructions

EXHIBIT

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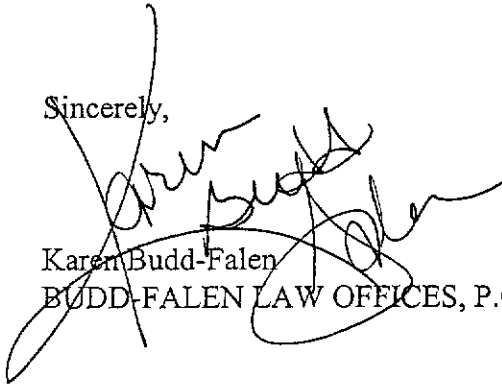
4. All e-mail documents, telephone notes, letters or any other documentation sent from any employee in the BLM office regarding either (1) the settlement agreement itself with Frank Robbins or (2) any alleged violations of the settlement agreement by Frank Robbins.
5. All e-mail documents, telephone notes, letters or any other documentation sent to the Interior Inspector General's Office and/or Jack Romer.
6. All e-mail documents, telephone notes, letters or any other documentation written by or received by David Wallace regarding Frank Robbins and the High Island, HD or Owl Creek Ranches since Mr. Wallace took a position with the Worland BLM.
7. All information in any form showing the "chain of command" or management heirarchy within the Worland BLM.

I also request that if you determine that some of the information requested is exempt from FOIA, that this information be identified by document, along with the statutory basis for your claim and your reasons for not exercising your discretion to release this information. FOIA also provides that if only portions of the file are exempt from release, the remainder of the file must be released. Therefore, I request that I be provided with all non-exempt portions that can reasonably be segregated.

If there is any problem in providing this information, please let me know so that further arrangements can be made.

Thank you for your cooperation.

Sincerely,

  
Karen Budd-Falen  
BUDD-FALEN LAW OFFICES, P.C.

KBF:vld

y xc: Frank Robbins

Karen Budd-Falen<sup>1</sup>  
 Franklin J. Falen<sup>1</sup>  
 Marc R. Stimpert<sup>1,2</sup>  
 Richard W. Walden<sup>1,2,4</sup>  
 Brandon L. Jensen<sup>1,3</sup>  
 Richard M. AuBuchon<sup>1</sup>  
 Robert D. Singletary<sup>1,2</sup>  
 Lloyd D. Rickenbach<sup>5</sup>

300 East 18th Street  
 Post Office Box 346  
 Cheyenne, Wyoming 82003-0346  
 Telephone 307/632-5105  
 Telefax 307/637-3891  
 E-Mail main@buddfalen.com  
 Website www.buddfalen.com

U.S. Postal Service  
**CERTIFIED MAIL RECEIPT**  
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Postage \$  
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 Return Receipt Fee (Endorsement Required) \$  
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Serial # 0000002519  
 Street, Apt. No., Box No. Worland WY 82401  
 ZIP+4 82401-0119

Postmark: JUL 30 2003 CHEYENNE WY

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See Reverse for Instructions

July 30, 2003

**CERTIFIED MAIL**  
**/RETURN RECEIPT REQUESTED**  
 7002 0860 0007 6297 8075

FOIA Officer  
 Bureau of Land Management  
 Worland Field Office  
 101 South 23<sup>rd</sup>  
 PO Box 119  
 Worland, WY 82401-0119

Re: Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, on behalf of Frank Robbins, I request the you mail to my copies of the following documents:

1. Memorandum dated March 7, 2002  
 Re: Review Team; H. Frank Robbins Cases
2. Fact Finding Review dated April 16, 2002
3. Memorandum dated April 22, 2002 to Barnes from David L. Wallace  
 Re: Determination: East Cottonwood & West Cottonwood Allotments

This information should not be subject to the Freedom of Information Act exemptions and access to the requested documents should be granted within twenty (20) working days. If you determine that some of the information requested is exempt from FOIA, that this information be





identified by document, along with the statutory basis for your claim and your reasons for not exercising your discretion to release this information. FOIA also provides that if only portions of the file are exempt from release, the remainder of the file must be released. Therefore, we request that we be provided with all non-exempt portions that can reasonably be segregated.

If there is any problem in providing this information, please contact Leann Kuhl with my office, so that further arrangements can be made.

Thank you for your cooperation.

Sincerely,

  
Karen Budd-Falen  
BUDD-FALEN LAW OFFICES, P.C.

KBF:lmk

xc: Frank Robbins

Karen Budd-Falen<sup>1</sup>  
 Franklin J. Falen<sup>1</sup>  
 Marc R. Stimpert<sup>1,2</sup>  
 Richard W. Walden<sup>1,2,4</sup>  
 Brandon L. Jensen<sup>1,3</sup>  
 Richard M. AuBuchon<sup>1</sup>  
 Robert D. Singletary<sup>1,2</sup>  
 Lloyd D. Rickenbach<sup>1,5</sup>  
 Karen L. Spinola<sup>1</sup>

300 East 18th Street  
 Post Office Box 346  
 Cheyenne, Wyoming 82003  
 Telephone 307/632-5100  
 Telefax 307/637-3891  
 E-Mail main@buddfalen.com  
 Website www.buddfalen.com

September 17, 2003

VIA U.S. MAIL  
 CERTIFIED/RETURN RECEIPT  
 7002 0860 0007 6297 8648

Bureau of Land Management  
 FOIA Officer  
 Worland District Office  
 P.O. Box 119  
 Worland, Wyoming 82410

Re: Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, I request that I receive the following:

1. A copy of the memo from the Worland office to the BLM State Director in Wyoming dated March, 2002 in which the following quote appears:

Mr. Robbins has shown a complete disregard for the terms and conditions of the permits and of the authority of the BLM to manage public lands. . . . The cumulative effects of unauthorized grazing is causing significant damage to public land resources on his permitted allotments."

The quotation appeared in a Billings Gazette newspaper article dated September 9, 2003. A copy of the article is attached for your reference.

2. A copy of all studies, data, field observations, field notes, conversation records, photographs and all other documents upon which the BLM reached the conclusion that Robbins livestock grazing is causing significant damage to his permitted allotments.

F:\USERS\WICKY\ROBBINS\LETTERS\FOIA\9.17.03.wpd

U.S. Postal Service  
 CERTIFIED MAIL RECEIPT  
 (Domestic Mail Only: No Insurance Coverage Provided)

OFFICIAL MAIL

Postage \$  
 Certified Fee \$  
 Return Receipt Fee \$  
 Restricted Delivery Fee \$  
 Endorsement Required \$  
 Total Postage & Fees \$

Postmark Here  
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SEP 17 03  
 CHEYENNE WY

POSTALIA 263439  
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Form 3800, April 2002

EXHIBIT

8

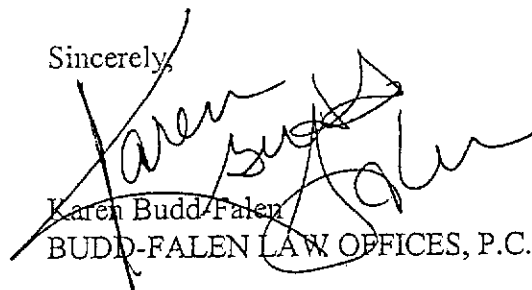
September 17, 2003

Page 2

I also request that if you determine that some of the information requested is exempt from FOIA, that this information be identified by document, along with the statutory basis for your claim and your reasons for not exercising your discretion to release this information. FOIA also provides that if only portions of the file are exempt from release, the remainder of the file must be released. Therefore, I request that I be provided with all non-exempt portions that can reasonably be segregated.

If there is any problem in providing this information, please let me know so that further arrangements can be made.

Sincerely,



Karen Budd-Falen  
BUDD-FALEN LAW OFFICES, P.C.

KBF:vld

Enclosure

xc : Tom French  
Frank Robbins

*Budd-Falen Law*

Karen Budd-Falen<sup>1</sup>  
 Franklin J. Falen<sup>1</sup>  
 Marc R. Stimpert<sup>1,2</sup>  
 Richard W. Walden<sup>1,2,4</sup>  
 Brandon L. Jensen<sup>1,3</sup>  
 Richard M. AuBuchon<sup>1</sup>  
 Robert D. Singletary<sup>1,2</sup>  
 Lloyd D. Rickenbach<sup>1,5</sup>  
 Karen L. Spinola<sup>1</sup>

300 East 18th Street  
 Post Office Box 34  
 Cheyenne, Wyoming 82001  
 Telephone 307/632-5111  
 Telefax 307/637-3891  
 E-Mail main@buddfalen.com  
 Website www.buddfalen.com

September 19, 2003

VIA U.S. MAIL  
 CERTIFIED/RETURN RECEIPT  
 7002 0860 0007 6297 8655

Wyoming State Bureau of Land Management  
 ATTN: ALAN KESTERKE  
 5353 Yellowstone  
 Post Office Box 1828  
 Cheyenne, WY 82003

Re: Freedom of Information Act Request

Dear Mr. Kesterke,

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, I request that I receive the following:

1. All documents, correspondence, telephone conversation notes, e-mails, photographs, meeting minutes and any other document in your possession dealing with, pertaining to or mentioning Frank Robbins, the High Island Ranch, the HD Ranch and/or the Owl Creek permit transfer.

I also request that if you determine that some of the information requested is exempt from FOIA, that this information be identified by document, along with the statutory basis for your claim and your reasons for not exercising your discretion to release this information. FOIA also provides that if only portions of the file are exempt from release, the remainder of the file must be released. Therefore, I request that I be provided with all non-exempt portions that can reasonably be segregated.

EXHIBIT

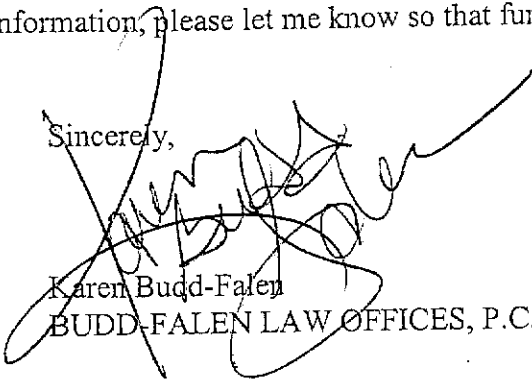
9

September 19, 2003

Page 2

If there is any problem in providing this information, please let me know so that further arrangements can be made.

Sincerely,



Karen Budd-Falen

BUDD-FALEN LAW OFFICES, P.C.

KBF:vld

Enclosure

xc : Tom French  
Frank Robbins

Karen Budd-Falen<sup>1</sup>  
 Franklin J. Falen<sup>1</sup>  
 Marc R. Stimpert<sup>1,2</sup>  
 Richard W. Walden<sup>1,2,4</sup>  
 Brandon L. Jensen<sup>1,3</sup>  
 Richard M. AuBuchon<sup>1</sup>  
 Lloyd D. Rickenbach<sup>1,5</sup>  
 Karen L. Spinola<sup>1</sup>

300 East 18th Street  
 Post Office Box 346  
 Cheyenne, Wyoming 82003-0346  
 Telephone 307/632-5105  
 Telefax 307/637-3891  
 E-Mail main@buddfalen.com  
 Website www.buddfalen.com

October 3, 2003

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**  
 7002 0860 0007 6298 0160

FOIA Officer  
 Bureau of Land Management  
 Worland Field Office  
 101 South 23<sup>rd</sup>  
 PO Box 119  
 Worland, WY 82401-0119

Re: Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, on behalf of Frank Robbins, I request the you mail to my office all records, documents, letters, notes, e-mails, correspondence and documents in all other files with Darrell Barnes has maintained separate from the general Worland BLM office files relating in any manner to Frank Robbins, the HD, High Island and/or Owl Creek ranches.

This request includes but is not limited to any records, documents, letters, notes e-mails, correspondence and all other documents or files with Darrell Barnes has maintained separate from the general office files regarding the Frank Robbins settlement agreement with the BLM and Department of the Interior.

This information should not be subject to the Freedom of Information Act exemptions and access to the requested documents should be granted within twenty (20) working days. If you determine that some of the information requested is exempt from FOIA, that this information be identified by document, along with the statutory basis for your claim and your reasons for not exercising your discretion to release this information. FOIA also provides that if only portions of the file are exempt from release, the remainder of the file must be released. Therefore, we request that we be provided with all non-exempt portions that can reasonably be segregated.

U.S. Postal Service  
**CERTIFIED MAIL RECEIPT**  
 (Domestic Mail Only; No Insurance Coverage Provided)

OFFICIAL

Postage \$  
 Certified Fee \$  
 Return Receipt Fee \$  
 Endorsement Required \$  
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 Endorsement Required \$  
 Total Postage & Fees \$

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 CHEYENNE WY

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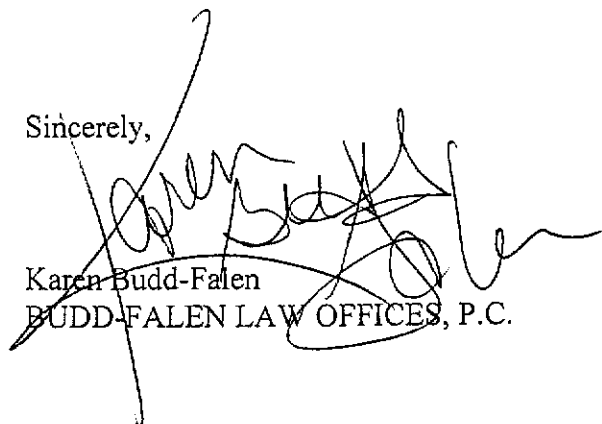
Sent by  
 Worland BLM  
 Box No.  
 City, State, ZIP+4  
 See Reverse for Instructions

EXHIBIT

10

Thank you for your cooperation.

Sincerely,



Karen Budd-Falen  
BUDD-FALEN LAW OFFICES, P.C.

KBF:lmk

xc: Frank Robbins

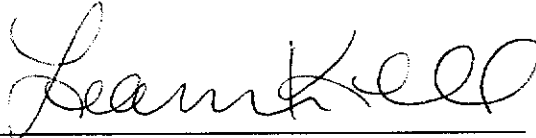
**DECLARATION OF LEANN M. KUHL**

I, Leann M. Kuhl, make this declaration based upon my personal knowledge and belief of the facts and circumstances set forth below:

1. I, Leann M. Kuhl, am over the age of 18;
2. I am a paralegal for the law firm Budd-Falen Law Offices, L.L.C.;
3. My work address is 300 East 18<sup>th</sup> Street, Cheyenne, WY 82001;
4. I am also the FOIA Coordinator for Budd-Falen Law Offices, L.L.C.;
5. I am familiar with the FOIA requests that are the subject of this lawsuit, to include the dates the requests were sent out of our office and the expected response dates;
6. Of the ten FOIA requests sent to either the Worland Bureau of Land Management ("BLM") or the Wyoming State Office for the BLM, our office only received responses for seven of the ten requests.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 25<sup>th</sup> day of November, 2003.

  
LEANN M. KUHL





## United States Department of the Interior

### BUREAU OF LAND MANAGEMENT

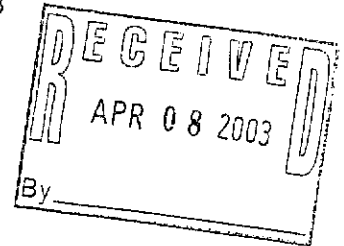
Worland Field Office  
P.O. Box 119  
Worland, Wyoming 82401-0119

In Reply Refer To:  
1278 (010)  
WY-2003-15

April 3, 2003

CERTIFIED MAIL NO. 7002 0860 0008 3519 3039  
RETURN RECEIPT REQUESTED

Leann Kuhl, Paralegal  
Budd-Falen Law Offices  
P. O. Box 346  
Cheyenne, WY 82003-0346



RE: Freedom of Information Request

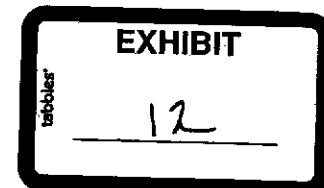
Dear Ms. Kuhl:

We are writing with respect to your Freedom of Information Act (FOIA) request dated February 17, 2003, and received in this office February 20, 2003, in which you ask for:

1. All telephone logs, conversation notes and emails from any telephone or computer used for office business for or from ... [16] ... BLM ... employees from January 1, 2003 to the present.
2. A copy of all FOIA requests sent to the Worland BLM Office from January 1, 2003 to the present.
3. A copy of all notes, meeting minutes, correspondence or any other documents including any agendas or briefing papers relating to or generated from the Interagency Coordination Group meeting held on January 31, 2003 from 9:00 a.m. to 3:30 p.m. at the Worland Field Office.

As explained in our letter of March 19, 2003, the scope of your request is extensive, and search time involved will be considerable, in particular with respect to item 1. NARA (National Archives and Records Administration) and DOI requirements dictate that employees (1) determine which of their emails constitute agency records, then (2) print such emails and properly file them in the appropriate file—which could be a subject matter file, serialized case file, and so forth—before deleting the email from the system. In order to locate all emails that might have been transmitted or received by the individuals listed, it will be necessary to search most every file within the Worland Field Office. We estimate that this task alone will take several hundred work hours.

It has been determined that you fall under the "other" category for purposes of fee calculations, which entitles you to the first 2 hours of search time and the first 100 pages at no cost. Please note that the Department of the Interior, as part of its new FOIA regulations published in the Federal Register on October 21, 2002 (FR Vol 67, No. 203 / Monday October 21, 2002 / Rules and Regulations, Pages 64527 to 64552), has established a new fee schedule for processing FOIA requests. The current fee schedule can be found on the DOI FOIA web site at <http://www.doi.gov/foia/whatsnew.html>.



The estimated costs for processing your request as submitted are as follows:

Search Time:

Clerical	100 hrs @ \$18.40/hr	\$ 1,840.00
Professional	300 hrs @ \$32.00/hr	9,600.00
Managerial	100 hrs @ \$46.40/hr	4,640.00
[Less 2 hours which are free]		( 92.80)

Copies:

5,000 pp @ \$0.13/pg	\$ 650.00
[Less 100 pages which are free]	\$ ( 13.00)

TOTAL COST: \$16,624.20

In accordance with 43 CFR 2.18 (b) and (c), we request that you pay these costs in advance. Enclosed is a "Bill for Collection," Number A429113. Please remit a check or money order, in the amount of \$16,630.00 payable to the Bureau of Land Management, to:

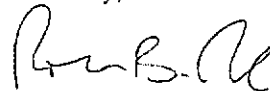
Bureau of Land Management  
Worland Field Office  
P.O. Box 119  
Worland, WY 82401-0119

We will begin to process your request once we have received this payment. The actual cost may be somewhat greater or less than this figure. Once we begin processing your request, if we find that the actual costs differ significantly from the estimate above, we will notify you immediately. Because the search time involved with your request is so extensive, we will be unable to provide responsive records immediately. We estimate that it will take approximately 3 to 4 months to provide all of the documents responsive to your request.

As an alternative, you may wish to modify the scope of your request at this time in order to reduce the fee. For example, you may wish to identify specific topics or subject matter to be considered in the search, rather than all documents regarding any possible number of topics.

If we do not hear from you within 30 days from the date of this letter, we will assume you are no longer interested in receiving the requested records, and will close your case file. If you have any questions at this time, or wish to discuss narrowing the scope of your request, please feel free to contact Margy Tidemann, FOIA Coordinator, at (307) 347-5167.

Sincerely,



for Field Manager

Form 1371-22  
(May 1988)UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT

Bill Number

A429113

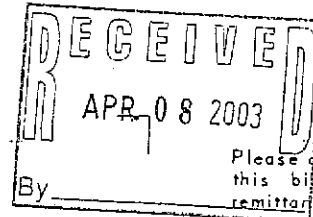
Date

April 3, 2003

## BILL FOR COLLECTION

Make Remittance Payable To: DOI, Bureau of Land Management  
P. O. Box 119  
Worland, Wyoming 82401-0119Budd-Falen Law Offices  
P. O. Box 346

PAYER: Cheyenne, Wyoming 82003-0346

Please detach top portion of  
this bill and return with  
remittance.

Amount of Payment \$ \_\_\_\_\_

DATE	DESCRIPTION	AMOUNT																		
4/3/2003	<p>Estimate for fees that may be incurred in responding to Freedom of Information Act request filed by Leeann <del>Roll</del>, Paralegal dated February 17, 2003. BLM #WY-2003-15</p> <p>Search Time:</p> <table> <tr> <td>Clerical</td><td>100 hrs @ \$18.40/hr.</td><td>\$ 1,840.00</td></tr> <tr> <td>Professional</td><td>300 hrs @ \$32.00/hr</td><td>9,600.00</td></tr> <tr> <td>Managerial</td><td>100 hrs @ \$46.40/hr</td><td>4,640.00</td></tr> <tr> <td></td><td>[Less 2 hours which are free]</td><td>(92.80)</td></tr> </table> <p>Copies:</p> <table> <tr> <td></td><td>5,000 pp @ \$-.13/pg</td><td>\$ 650.00</td></tr> <tr> <td></td><td>[Less 100 pages which are free]</td><td>(13.00)</td></tr> </table> <p>TOTAL COST</p> <p>\$16,624.20</p>	Clerical	100 hrs @ \$18.40/hr.	\$ 1,840.00	Professional	300 hrs @ \$32.00/hr	9,600.00	Managerial	100 hrs @ \$46.40/hr	4,640.00		[Less 2 hours which are free]	(92.80)		5,000 pp @ \$-.13/pg	\$ 650.00		[Less 100 pages which are free]	(13.00)	\$16,624. 20
Clerical	100 hrs @ \$18.40/hr.	\$ 1,840.00																		
Professional	300 hrs @ \$32.00/hr	9,600.00																		
Managerial	100 hrs @ \$46.40/hr	4,640.00																		
	[Less 2 hours which are free]	(92.80)																		
	5,000 pp @ \$-.13/pg	\$ 650.00																		
	[Less 100 pages which are free]	(13.00)																		
<p>INTEREST WILL BE ASSESSED AT THE RATE OF 5 % PER YEAR IF FULL PAYMENT IS NOT MADE WITHIN 30 DAYS OF THE DATE OF THIS BILL.</p> <p>SEE NOTICE OF ACTIONS IN EVENT OF DELINQUENCY ON REVERSE.</p>																				
AMOUNT DUE THIS BILL		\$ 16,624. 20																		

NOTE: A receipt will be issued for all cash remittances and for all other remittances when required by applicable procedures. Failure to receive a receipt for cash payment should be promptly reported to the bureau or office shown above.



# United States Department of the Interior

## BUREAU OF LAND MANAGEMENT

Worland Field Office  
P.O. Box 119  
Worland, Wyoming 82401-0119

In Reply Refer to:  
1278  
WY-2003-15

June 22, 2003

FAX SENT June 22, 2003, Hard Copy to Follow

CERTIFIED MAIL NUMBER 7003 0500 0004 8602 0418  
RETURN RECEIPT REQUESTED

Karen Budd-Falen, Attorney-at-Law  
Budd-Falen Law Offices  
P. O. Box 346  
Cheyenne, Wyoming 82003-0346

RE: Freedom of Information Act Request

Dear Ms. Budd-Falen:

The following is in response to your Freedom of Information Act request dated February 17, 2003 and received in this office February 20, 2003. After additional communication your request was modified on June 4, 2003. You modified to scope of the request to cover responsive documents relating to H. Frank Robbins, the High Island Ranch, the HD Ranch, and the Owl Creek Ranch from January 1, 2003 through February 20, 2003.

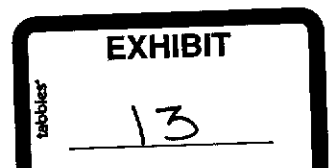
In your request you asked for:

**Item 1.** "...All telephone records, telephone logs, conversation notes and emails from any telephone or computer used for office business =for of from the following ...[BLM] employees from January 1, 2003 to present:

Roger Bankert  
Jim Roseberry  
Chet Wheelless  
Lin Canella  
Dallas Heller  
Greg Berry  
Darrell Barnes  
Tim Stevens

Roger Inman"  
Tom Ball  
Destin Harrell  
Bryan McKenzie  
Jim Wolf  
Teryl Shryack  
Nancy Baker  
Bob Gate

**Item 2.** <sup>0</sup> "A copy of all FOIA requests sent to the Worland BLM Office from January 1, 2003 to the present."



**Item 3.** "...a copy of all notes, meeting minutes, correspondence or any other documents including any agendas or briefing papers relating to or generated from the Interagency Coordination Group meeting held on January 31, 2003...at the Worland BLM Office."

The following is our response by item. Copies of the responsive documents in our possession pertaining to your request are enclosed.

**Item 1** The following employees have reviewed their files and are unable to locate any records that are responsive to your request.

Roger Bankert	Darrell Barnes	Jim Wolf
Jim Roseberry	Tim Stevens	Teryl Shryack
Chet Wheelless	Tom Ball	Nancy Baker
Dallas Heller	Destin Harrell	Bob Bate
Greg Berry	Bryan McKenzie	

Documents responsive to your request from Len Cannella Range Technician are:

A conversation records dated 1/22/03

1 pg

Roger Inman is out of the office. Because of his position in the organization, we do not believe he has any responsive documents; however we will check with him as soon as he returns and, if there are responsive documents, we will forward them to you.

Your request listed one of the employees as "Bob Gate." We have an employee, Jim Gates, but we are assuming you meant Bob Bate since he was the only one of the two that attended the Interagency Coordination Meeting.

It has been determined that the computerized data regarding Wyoming BLM phone activity, which is maintained in the State Office, is not responsive to your request. The data reflects only basic information regarding calls made—date, time, and duration of each call; the number called; and the phone extension from which the call originated. We have no way to determine from this data the identify of the parties called, or whether any of the calls might have addressed the subject of Frank Robbins, HD Ranch, High Island Ranch, or Owl Creek Ranch. [As a side note, due to a size limit on the system, older information is automatically deleted as the limit is reached. At the time of your request, we were able to capture and retain data back to January 16, 2003, but could not go back as far as January 1, 2003].

**Item 2:** Copies of the FOIA requests received by the Worland BLM Office from January 1, 2003 to the present..

31 pp

**Item 3:** Copies of the responsive documents for this item are:

An e-mail message with attachment, Roger Bankert, dated 2/5/03	5 pp
Hand-written meeting notes, Jim Roseberry, n.d.	9 pp
Wyoming Game & Fish "memo" Tom Easterly to Jim Roseberry	1 pg
Southwest Fuels Analysis Area Vicinity Map.	1 pg
Meeting Register	1 pg
Inter-Agency Coordination Meeting agenda with Fax Covers	6 pp

We are withholding all documents directly related to Deliberative Process Privileged documents in accordance with Exemption 5 of the FOIA (5 U.S.C. 552(b)). This documentation consists of approximately 14 hard-copy (xerox) pages. We are also withholding all documents directly related to Attorney/Client Privileged documents in accordance with Exemption 5 of the FOIA (5 U.S.C. 552(b)). This documentation consists of approximately 2 hard-copy pages.

The official responsible for this denial is the undersigned, in consultation with the Department of Interior Solicitor's Office. Under 43 CFR 2.18, you have the right to appeal this decision to:

Freedom of Information Act Appeals Officer  
U.S. Department of the Interior  
Office of Information Resources Management (OIRM)  
1849 C Street, NW (MS-5312, MIB)  
Washington, D.C. 20240

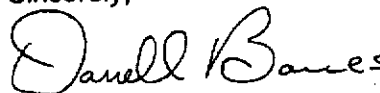
Your appeal must be in writing and received no later than 20 workdays after the date of this letter. The appeal should be marked "FREEDOM OF INFORMATION APPEAL" on both the envelope and the face of the letter. A copy of your original request and this letter should accompany the appeal. To expedite the appeal process and to ensure full consideration of your appeal, your should contain a brief statement of the reasons why you believe this decision is in error.

Because of the current mail delivery delays in Washington, DC, you may fax your appeal to: Appeals Officer (202) 208-6677.

It has been determined that you fall under the "other" category for purposes of fee calculations. Because you are entitled to the first 2 hours search time and the first 100 pages at no cost, there is no fee for these documents.

If you have any questions please contact Roger Bankert, Acting Assistant Field Manager, Resources at (307) 347-5100.

Sincerely,



Darrell Barnes  
Field Manager

Karen Budd-Falen<sup>1</sup>  
Franklin J. Falen<sup>1</sup>  
Marc R. Stimpert<sup>1,2</sup>  
Richard W. Walden<sup>1,2,4</sup>  
Brandon L. Jensen<sup>1,3</sup>  
Richard M. AuBuchon<sup>1</sup>  
Robert D. Singletary<sup>1,2</sup>  
Lloyd D. Rickenbach<sup>5</sup>

300 East 18th Street  
Post Office Box 346  
Cheyenne, Wyoming 82003-0346  
Telephone 307/632-5105  
Telefax 307/637-3891  
E-Mail main@buddfalen.com  
Website www.buddfalen.com

<sup>1</sup>admitted in Wyoming  
<sup>2</sup>admitted in Oklahoma  
<sup>3</sup>admitted in Colorado  
<sup>4</sup>admitted in California  
<sup>5</sup>admitted in Utah

September 2, 2003

William G. Myers III  
Solicitor, Department of the Interior  
MS 6352-MIB  
1849 C Street, NW  
Washington, D.C. 20240

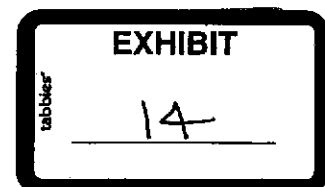
Rebecca Watson  
Assistant Secretary  
Land and Minerals Management  
Department of the Interior  
MS 6628-MIB  
1849 C Street, NW  
Washington, D.C. 20240

Re: Frank Robbins Requests for Information

Dear Bill and Ms. Watson:

The purpose of this letter is to convey my concern regarding the Bureau of Land Management's ("BLM") transmission of certain information to this firm via the Freedom of Information Act ("FOIA") versus information that is given to the "public" as public documents. On July 1, 2003, I sent a FOIA request to the Worland BLM regarding certain information used for a newspaper article regarding Frank Robbins. On August 22, 2003 (substantially after the statutory period for responding to a FOIA had passed), I received the attached letter from Darrell Barnes, with a substantially redacted FOIA response. See Exhibit 1. Mr. Robbins has never been allowed to review his files that are "public documents," although apparently the Casper Star Tribune can review those "public documents."

On August 27, 2003, I received a telefax with certain documents from a newspaper reporter with the Casper Star Tribune. See Exhibit 2. This telefax contained a complaint prepared by PEER (Public Employees for Environmental Responsibility) to the Interior Inspector General. The complaint from PEER was dated the same date as it was telefaxed to me from the Casper Star reporter. One of the documents attached to the PEER complaint was the same type of document that Darrell Barnes sent to me in the redacted form. In other words, first PEER, then the Casper Star Tribune received information from the Worland BLM that the Worland BLM will not send to me regarding my client. Additionally interesting is that a part of the Requests for Admission transmitted to this office from Darrel Barnes, District Manager at the Worland BLM is a statement that the Worland BLM has NEVER transmitted any information to



September 2, 2003

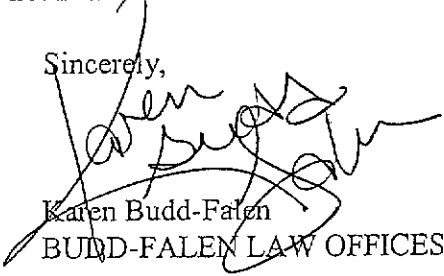
Page 2

PEER. See Exhibit 3 Question 13.

Although I understand that there are those in the Department of the Interior who are investigating the propriety of the settlement agreement between Frank Robbins and the BLM, I would request that this blatant violation of FOIA be added to that investigation. There are two sides to every story. I sincerely hope that the Department of the Interior is considering both sides of the information being gathered by it.

Should you have any questions, please do not hesitate to contact me.

Sincerely,



Karen Budd-Falen

BUND-FALEN LAW OFFICES, P.C.

KBF:vld

Enclosure

xc w/enc.: Frank Robbins  
John Kunz  
Bob Comer  
Tom Roberts  
Tom French  
Fran Cherry





# United States Department of the Interior

BUREAU OF LAND MANAGEMENT  
Workland Field Office  
P.O. Box 119  
Workland, Wyoming 82401-0119

In Reply Refer To:  
1278 (010)  
WY-2003-49

August 22, 2003

CERTIFIED MAIL NO. 7003 0500 0004 8602 5390  
RETURN RECEIPT REQUESTED

Karen Budd-Falen  
Budd-Falen Law Offices  
P. O. Box 346  
Cheyenne, WY 82003-0346

RE: Freedom of Information Act Request – Casper Star Tribune Article

Dear Ms. Budd-Falen:

We are writing with respect to your letter of July 1, 2003, in which you ask for information relating to an article that appeared in the June 22, 2003 Casper Star Tribune newspaper. In your request, you provided statements made in the article, and asked for "... the information upon which these statements were based or may have been based." Specifically, you asked for:

1. Any files, documents and other information given to the Casper Star Tribune or any employee of that newspaper regarding Frank Robbins or any of his operations, at any time, and
2. Any files, documents and information upon which any statements made by any BLM employees appearing in the June 2, 2003 article were based.

With respect to Item 1:

We have no records of which specific documents were provided to the Casper Star Tribune (CST) staff. The Casper Star Tribune (CST) staff did not submit a FOIA request for any documents; the only documents provided to the CST staff were public documents, which are available for review and copy (without filing a FOIA request) by any member of the public. Bureau of Land Management offices do not record which specific public documents are copied and provided to public requesters.

With respect to Item 2:

With one exception, the statements from the article that you have included in your letter were made by the CST or other organizations (e.g., Ruch), not by BLM staff. The statements made by the CST were presumably based upon the review of public documents conducted by the CST staff, and reflect the opinion of that newspaper.



The one statement that was attributed to a Worland BLM employee was quote number 4 in your letter, which reads as follows:

"According to Dave Wallace, supervisory range conservationist, Worland has sent about a dozen issues to Cheyenne. Some issues have expired, others have been worked through, but still others are unresolved, Wallace said."

The attached documents is a chronological listing of topics sent from the Worland Field Office to the Wyoming State Office. Mr. Wallace did not have this document at hand when interviewed by the CST, but was trying to recall this document from memory as best as possible when stating that some topics had been sent to the State Office subsequent to the settlement agreement.

We have redacted information from this document in accordance with Exemptions 5, 6, 7(A), 7(C), and 7(D) of the FOIA (5 U.S.C. 552(b)). Redacted information can be identified by the "blackout" markings on the document. All redacted information is withheld under Exemptions 5 and 7(A). Portions of the redacted information are also withheld under Exemptions 6, 7(C), and (7D). These portions are indicated with notes in the document.

With respect to Exemption 5: The entire set of information withheld consists of intra-agency communications reflecting staff opinion and materials submitted to management for review and consideration. Release of this deliberative, pre-decisional material would have a chilling effect on our internal deliberative process. Premature release of this material before it is adopted or acted upon in any final form would also likely confuse the public as to any actual policy or decision, as well as which reasons and rationales were ultimately considered in formulating a final policy or decision. For these reasons, a sound legal basis exists for withholding these documents from release.

With respect to Exemption 6: Portions of the information consist of unsolicited comments from private individuals. We are unable to discern any public interest that would be served by release of this material, and have determined that release of the material would constitute an unwarranted invasion of personal privacy. For these reasons, a sound legal basis exists for withholding these records from release. Release of any portion of this information could reasonably be expected to reveal identities of individuals involved.

With respect to Exemption 7: Release of any of the redacted material could reasonably be expected to interfere with current or prospective enforcement proceedings, and is withheld in accordance with Exemption 7(A). Portions of the material also contain personal information that has been withheld in accordance with Exemption 7(C), as disclosure of this information could reasonably be expected to constitute an unwarranted invasion of personal privacy. In addition, this same material is withheld in accordance with Exemption 7(D), as release of this information could reasonably be expected to disclose the identity of a confidential source.

The official responsible for this partial denial and partial "no records" response is the undersigned, in consultation with the Office of the Regional Solicitor, Department of the Interior, Denver, CO 80225. In accordance with Department of the Interior regulations at

43 CFR 2.28-2.30 (2003), you have the right to appeal this decision to:

Freedom of Information Act Appeals Officer  
U.S. Department of the Interior  
Office of Information Resources Management (OIRM)  
1849 C Street, NW (MS-5312, MIB)  
Washington, D.C. 20240

Your appeal must be in writing and received no later than 30 workdays after the date of this letter. The appeal should be marked "FREEDOM OF INFORMATION APPEAL" on both the envelope and the face of the letter. A copy of your original request and this letter should accompany the appeal. To expedite the appeal process and to ensure full consideration of your appeal, your letter should contain a brief statement of the reasons why you believe this decision is in error. Because of the current mail delivery delays in Washington, DC, you may fax your appeal to: FOIA Appeals Officer (202) 208-6677.

No fee is charged for responding to your request, as the cost does not meet the \$30 threshold limit established by the Department for fee collection under the FOIA (43 CFR 2.18(a), 2003).

If you have any questions with respect to this response, please contact Margy Tidemann, FOIA Coordinator, at (307) 347-5167.

Sincerely,

A handwritten signature in cursive script, appearing to read "Danell Bowers".

Field Manager

Attachment -- 2 pp

2003

[FOIA NOTE: Items 117 and 121 have been withheld in accordance with Exemptions 5, 6, 7(A), 7(C) and 7(D) of the FOIA (5 U.S.C. 552(b)). The remainder have been withheld in accordance with Exemptions 5 and 7(A) of the Act.]

113. January 15, 2003

*Settlement Agreement Signed*

114. February 13, 2003

*Issuance of the Owl Creek Grazing Permit*

Information to WSO: F. Robbins received the permit and signed it on February 14, 2003.

[REDACTED]

The Owl Creek Conditional Grazing Permit approved on February 26, 2003.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

115. February 26, 2003

*Owl Creek Grazing Permit Issuance*

□

[REDACTED]

116. March 24, 2003

[REDACTED]

Information to WSO:

[REDACTED]

117. March 24, 2003

[REDACTED]

Information to WSO:

[REDACTED]

[REDACTED]

[FOIA NOTE: The above record has been withheld in accordance with Exemptions 5, 6, 7(A), 7(C) and 7(D) of the FOIA (5 U.S.C. 552(b).)]

118. March 31, 2003

**Information to WSO:**

[REDACTED]

119. April 15, 2003

[REDACTED]

**Information to WSO:**

[REDACTED]

120. May 30, 2003

[REDACTED]

[REDACTED]

121. June 11, 2003

[REDACTED]

**Information to WSO:**

[FOIA NOTE: The above record has been withheld in accordance with Exemptions 5, 6, 7(A), 7(C) and 7(D) of the FOIA (5 U.S.C. 552(b).)]

122. June 11, 2003

**Information to WSO:**

[REDACTED]

FAX TRANSMISSION SHEET

Date: 8/28

TO: Karen Budd-Falen LOCATION: \_\_\_\_\_  
FROM: Brodie Farguhar 266-0538

Number of sheets (including cover sheet) \_\_\_\_\_

NOTES: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

To transmit to our FAX machine, please call (307) 266-0568  
0568

EXHIBIT  
tabbies  
2

Mr. Earl E. Devaney  
Inspector General  
Department of Interior  
1849 C Street, NW  
Washington, DC 20240

August 28, 2003

Dear Mr. Devaney:

I am writing on behalf of Public Employees for Environmental Responsibility (PEER) to request that your office conduct an investigation into irregularities in rangeland regulatory enforcement by the Bureau of Land Management (BLM) Wyoming State Office and Washington Office Headquarters. Specifically, PEER is asking the Department of Interior Office of Inspector General to determine —

1. The reason that BLM Director Kathleen Clarke, or her designee, the BLM Wyoming State Director, has refused for a period of months to pursue or seek enforcement action for a number of grazing-related violations reported to it by its Worland Field Office concerning a permittee named Frank Robbins;
2. Why the BLM Washington Office did not act on or acknowledge reports from the Worland Field Office and the U.S. Attorney of ongoing grazing violations by Frank Robbins even as it negotiated an agreement conditionally dismissing prior violations contingent on no further violations during a two-year period; and
3. The rationale for the BLM Washington Office and the Office of the Solicitor executing an agreement with Mr. Robbins in the face of warnings from the U.S. Attorney that such an agreement would compromise the ability of the Department of Justice to represent BLM on matters of civil or criminal enforcement of BLM grazing regulations.

PEER believes the BLM Director, her designees and the responsible officials within the Office of the Solicitor for the Department of Interior have acted in violation of Executive Order 12674 of April 12, 1989 (as modified by E.O. 12731) in this matter. That Executive Order commands that all executive branch employees "shall act impartially and not give preferential treatment to any private organization or individual." The Executive Order further directs that "Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order."

In addition, PEER believes that these officials have undermined the purpose of the Federal Land Management Policy Act as articulated in 43 CFR 1601.0-2 to "maximize resource values for the public through a *rational, consistently applied* set of regulations and procedures..." (Emphasis added)

In an agreement dated November 27, 2002 executed between the BLM and Mr. Robbins, the agency conditionally stayed 16 adjudications involving citations for grazing violations (unauthorized grazing, overgrazing and grazing trespass) against Mr. Robbins. The agreement would be voided if, within 24 months of the agreement, BLM begins administrative enforcement or adjudication "alleging willful trespass, the violation of any regulation, law or BLM decision where range or resource degradation is at issue." The agreement also specified a "dispute resolution" mechanism whereby only the BLM Director "or any designee she chooses" may make decisions concerning issues encompassed by the agreement.

In addition, this remarkable agreement granted Mr. Robbins additional flexibility for grazing practices in allotments with less than 50 % federal ownership, conditional transfer of the Owl Creek permit, a right-of-way without reciprocal easement for BLM, consideration for preferential actual use billing for permitted grazing, a promise to facilitate a land exchange and a Special Recreation permit.

As the agreement was being finalized, Thomas Roberts, the Assistant U.S. Attorney for the District of Wyoming, wrote to John Kunz, Assistant Regional Solicitor, that the "agreement will clearly have an effect on the [sic] our ability to represent BLM in either criminal or civil matters" due to the unequal favorable treatment extended solely to Mr. Robbins [Exhibit I]. This letter was also circulated through the BLM chain-of command.

In a March 23, 2003 "Analysis of Billing History" for permits owned by Mr. Robbins, the BLM Worland Office found violations involving unauthorized grazing, inaccurate use reports and unpaid permit fees by Mr. Robbins [Exhibit II]. This Analysis also includes this notation:

"The WFO was instructed by WO in May 2002 that WO was working on a Settlement Agreement and that the WFO was to not respond to any unauthorized livestock use."

As seen from the following exhibits, that no-enforcement order with respect to Mr. Robbins by the BLM Wyoming Office appears to remain in effect until today.

In an April 14, 2003 memorandum to Assistant Regional Solicitor John Kunz, and forwarded to the BLM Wyoming State Office, the Worland Field Office supervisory rangeland specialist elaborated on a string of alleged ongoing violations by Mr. Robbins and concludes "a reasonable person would conclude that the above facts are inconsistent with the grazing permits and the Settlement Agreement." [Exhibit III]



In an August 4, 2003 memorandum to BLM Wyoming Associate State Director Alan Kesterke, the Worland Field Office supervisory rangeland specialist updated unresolved compliance issues concerning Mr. Robbins and appended a monitoring report on two of the Robbins allotments. [Exhibit IV] Summarizing condition on one of those allotments, the memo concludes:

"Difficult to find any residual grass with stubble height being less than 1 inch. Unable in some areas and difficult in other areas to find ungrazed grass plants and unable to identify grass due to level of grazing in many areas of the allotment...Utilization on public land is estimated at heavy to severe."

These documents and other records that are on file with the U.S. Attorney for the Wyoming District appear to demonstrate a pervasive and repeated posture reaching to the highest levels of BLM of refusing to enforce regulations and rules designed to protect federal rangelands from degradation against one individual. BLM negotiated and keeps in force an agreement granting various considerations to Mr. Robbins despite persistent reports from BLM staff of violations by Mr. Robbins before, during and after negotiation of the settlement agreement.

Not unexpectedly, this concerted conferral of preferential treatment on one permit holder has encouraged other permittees in Wyoming to also seek dispensation from regulatory requirements. As a result the actions of senior BLM and Solicitor officials has undermined rational and consistent management of federal rangelands to the detriment of the public interest.

If you have questions or need any additional information in order to evaluate the merits of this request for investigation, please do not hesitate to contact me.

Cordially,

Jeff Ruch  
Executive Director

Cc. Kathleen Clarke, BLM Director  
Robert Bennett, BLM Wyoming State Director  
William Myers, Solicitor, Department of Interior

UNITED STATES DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
Worland Field Office  
P.O. Box 119,  
Worland, Wyoming 82401-0119

IN REPLY REFER TO:

April 14, 2003

Memorandum

To: John Kunz, Regional Solicitor's Office

From: David L. Wallace, Supervisory Rangeland Specialist

Subject: Inquiry regarding livestock use by Frank Robbins

The Worland Field Office Range staff has monitored livestock use, as follows. The livestock use (i.e., monitoring information) and analysis are documented in the Official Records. The following information was sent to the Wyoming State Office (decision authority) on March 19, 21, and 24, 2003 as well as on April 10, 2003 (excludes information on 4/14/03 which has just been received).

Monitoring Information

3/07/03	#574 Coal Draw	Cert. of Livestock Count	62 Cattle
3/12/03	#574 Coal Draw	Cert. of Livestock Count	611 Cattle
<u>3/12/03</u>	Conversation Record (Frank Robbins with John Elliot and Len Cannella)		
-	Robbins stated that he is using #574 Coal Draw with 650 Cattle from 2/19/03 to 4/01/03		
-	Robbins stated that he has 330 Cattle on #535 West Cottonwood until 3/18/03		
-	Robbins stated that he was going to move his cattle to #573 Wagonbound Bench on 4/2/03		
3/14/03	#535 West Cottonwood	Cert. of Livestock Count	302 Cattle
3/26/03	#573 Wagonbound Bench	Cert. of Livestock Count	178 Cattle
-	Not an accurate and complete count because was incidental to sage grouse lek observations. The cattle were within about 1 mile radius of the lek.		
<u>4/14/03</u>	Conversation Record and Certified Actual Use Report (Frank Robbins with John Elliot)		
-	Robbins stated that he used #574 Coal Draw with 650 Cattle from 2/18/03 to 4/02/03		
-	Robbins stated that he used #535 West Cottonwood, Northwest pasture with 330 cattle from 01/24/03 to 3/24/03 <i>6 days</i>		
-	Robbins stated that he used #535 West Cottonwood, Powerline pasture from 02/10/03 to 02/17/03		
-	Robbins stated that he is using #573 Wagonbound Bench with 330 cattle 03/24/03 to 04/24/03 <i>22 days</i>		
-	Robbins stated that he is using #534 East Cottonwood with 650 cattle 04/03/03 to 05/01/03		

Agreement Analysis

A) In accordance with paragraph 4.b.(2)[page 7 of 16] of the Settlement Agreement, dated January 15, 2003, the #574 Coal Draw, # 573 Wagonhound Bench, and #535 West Cottonwood allotments (86%, 66%, and 52% public land acres, respectively) are to be grazed in accordance with the grazing permit, as follows:

#574 Coal Draw	360 cattle	11/01-02/06	928 AUMs
#573 Wagonhound Bench	173 cattle	09/15-02/28	560 AUMs
#535 West Cottonwood	330 cattle	03/01-04/23	281 AUMs
	330 cattle	11/20-02/28	526 AUMs

B) In accordance with paragraph 4.b.(1)[page 6 of 16], Settlement Agreement, dated January 15, 2003, Robbins has the ability to vary livestock numbers, season of use, and allocated AUMs without prior notification (i.e., additional management flexibility) in those allotments in which his deeded acres and state leased acres sum 50% or greater (this includes use of the #534 East Cottonwood @ 3,396 or 50% public land acres). He is only limited to use by utilization criteria set forth in paragraph 4.b.(1)[page 7 of 16].

General Conclusions

- 1) Robbins has not had any grazing authorizations since March 1, 2002 nor has he paid a grazing bill since that time. At this time, no prior grazing authorizations have been provided.
- 2) Robbins was grazing the Coal Draw allotment (2/18/03 reported on 4/14/03) previous to formal issuance of the grazing permit (Owl Creek Ranch) on 2/26/03.
- 3) Robbins has grazed Coal Draw, Wagonhound Bench, West Cottonwood (for 7 days Robbins had excess livestock numbers), and East Cottonwood differently than specified season of use and livestock numbers defined on the grazing permits without formal application for modifications requiring an environmental assessment decision process.
- 6 + 22 days 4) Robbins reports conflicting information regarding livestock use on 3/12/03 and 4/14/03 to John Elliot.
- 5) According to monitoring data, livestock use levels on key forage species surpass criteria outlined in either the Grass Creek RMP or the Settlement Agreement.
- 6) Under the terms of the Settlement Agreement and internal direction, WFO is not the decision making authority for identifying or resolving conflict. The aforementioned information is passed through the chain-of-command for resolution by the Director's Designee. This process has been followed.
- 7) Given the aforementioned, documented information, a reasonable person would conclude that the above facts are inconsistent with the grazing permits and the Settlement Agreement.



Case 2:03-cv-00230-WFD Document 2 Filed 11/25/03 Page 53 of 96  
consultation with our client agency, the Bureau of Land Management. We, in addition cannot  
"stipulate and agree" to take "further appropriate actions" which may in any way contradict a  
decision of the Office of Solicitor General to appeal any adverse decision.

get copy  
Page 6, paragraph 3 - This paragraph is substantially unchanged from the prior version which  
appeared at page 5, paragraph 3. We would thus reiterate the comments with regard to this paragraph  
set forth in our July 18, 2002, letter.

Page 8, paragraph 6 - This paragraph is substantially unchanged from the prior version which  
appeared at page 6, paragraph 5. We would thus reiterate the comments with regard to this paragraph  
set forth in our July 18, 2002, letter.

Page 9, paragraph 8 - This paragraph is substantially unchanged from the prior version which  
appeared at page 8, paragraph 7. We would thus reiterate the comments with regard to this paragraph  
set forth in our July 18, 2002, letter. The Office of the United States Attorney, District of Wyoming,  
is not counsel of record in this matter. In addition, the reference to paragraph "1r" should now be  
a reference to paragraph "1q".

Page 11, paragraph 10 - This paragraph originally appeared as page 9, paragraph 9, and has  
been extensively rewritten. The paragraph continues, however, to unnecessarily limit the Interior  
Board of Land Appeals decision dated May 20, 1999, which recognized the Bureau of Land  
Management has a limited administrative right of access across Robbins' private property to access  
and manage public land. The deletion of the "prior notice" requirement stated in the first draft of  
the settlement agreement is appropriate.

Page 13, paragraph 12 - This paragraph still suffers from the "to consider" problems  
identified in our July 18, 2002, letter under the heading page 11, paragraph 11.


Page 13 - the signature line for the United States Attorney, District of Wyoming, should be  
removed.

A global settlement of at least all administrative matters now pending between Robbins and  
the BLM is an admirable goal. This proposed agreement however is clearly not the vehicle reach to  
such goal. The agreement will clearly have an effect on the our ability to represent BLM in either  
criminal or civil matters. Another permittee and Robbins are, for example, both in violation of a  
closure order. BLM - Wyoming can immediately cite the other permittee. It can not however cite  
Robbins without Director approval. How do we handle the civil or criminal case brought to our  
office by BLM on the other permittee? What justification is there for prosecuting all permittees other  
than Robbins for the same conduct? It is not beyond the realm of possibility such issues may arise.

Thank you.

Sincerely,

MATTHEW H. MEAD  
United States Attorney

By   
THOMAS D. ROBERTS  
Assistant United States Attorney

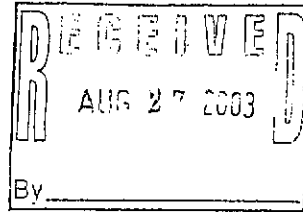
TDR:mkt

c: Bob Comer, Associate Solicitor (w/enc.)  
Division of Land & Water  
United States Department of Interior  
Office of the Solicitor  
1849 C Street, N.W., Mail Stop 6352  
Washington, DC 20240

Lori Caramanian, Attorney (w/enc.)  
Environment and Natural Resources Division  
United States Department of Justice  
Ben Franklin Station, P.O. Box 663  
Washington, D.C. 20044-0663

Thomas L. Sansonetti, Assistant Attorney General (w/enc.)  
Environment and Natural Resources Division  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW, Room 2141  
Washington, DC 20530-0001

THOMAS D. ROBERTS  
Assistant United States Attorney  
STEVEN K. SHARPE  
Assistant United States Attorney  
P.O. Box 668  
Cheyenne, WY 82003-0668  
Telephone: 307-772-2124  
Facsimile: 307-772-2123



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

HARVEY FRANK ROBBINS,

Plaintiff,

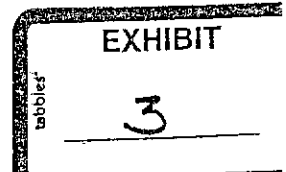
v.

BUREAU OF LAND MANAGEMENT ("BLM"))  
DEPARTMENT OF THE INTERIOR, THE )  
UNITED STATES OF AMERICA, CHARLES )  
WILKIE, individually and as an employee of )  
the BLM,, DARREL BARNES, individually )  
and as an employee of the BLM, )  
TERYL SHRYACK, individually and as an )  
employee of the BLM, PATRICK MERRILL, )  
individually and as an employee of the BLM, )  
DAVID STIMSON, individually and as an )  
employee of the BLM, MICHAEL MILLER, )  
individually and as an employee of the BLM, )  
GENE LEONE, individually and as an employee )  
of the BLM, and JOHN DOES 1 through 20, )

Defendants. )

No. 98CV201-B

DEFENDANT DARRELL BARNES RESPONSE TO PLAINTIFF'S  
COMBINED WRITTEN DISCOVERY INTERROGATORIES -  
REQUESTS FOR PRODUCTION - REQUEST FOR ADMISSIONS



### REQUESTS FOR ADMISSIONS

1. Please admit that the only SRUP which has ever been suspended by the BLM in Worland, Wyoming is the SRUP held by Frank Robbins.

RESPONSE: Deny.

2. Please admit that the BLM in Worland, Wyoming has never suspended a grazing permit.

RESPONSE: Deny.

3. Please admit that Frank Robbins is the only permittee of federal lands administered in Worland, Wyoming who has ever been issued a trespass citation for improvements made on a BLM road.

RESPONSE: Deny.

4. Please admit that the Defendant has been an employee of the BLM, Department of Interior continuously since he started working for the BLM to the date of this written discovery.

RESPONSE: Admit.

5. Please admit that the Defendant was an employee of the BLM during the events alleged in the Second Amended Complaint.

RESPONSE: Admit.

6. Please admit that the easement given to the BLM by George Nelson in 1994 was extinguished when Frank Robbins recorded his ownership interest in the High Island Ranch in 1994.

RESPONSE: Deny. This request addresses a legal theory on which Defendant is not qualified to respond.



7. Please admit that the Defendant gave awards, in the form of additional monetary compensation, to the BLM employees who testified as government witnesses in the United States District Court for the District of Wyoming case of *USA v. Harvey Frank Robbins*.

RESPONSE: Deny. All supervisors have authority to give awards to employees for superior performance, and numerous awards have been given since 1994. No awards were given to any employee for testifying at trial.

8. Please admit that Darrell Barnes opposed the final settlement agreement signed by the BLM and Frank Robbins.

RESPONSE: Defendant respectfully objects to this request for admission as not reasonably calculated to lead to the discovery of admissible evidence. Defendant further respectfully objects to this request as irrelevant and immaterial to the issues of this litigation.

9. Please admit that Darrell Barnes is opposed to the settlement agreement signed by the BLM and Frank Robbins.

RESPONSE: Defendant respectfully objects to this request for admission as not reasonably calculated to lead to the discovery of admissible evidence. Defendant further respectfully objects to this request for admission as irrelevant and immaterial to the issues of this litigation.

10. Please admit that since the settlement agreement signed by the BLM and Frank Robbins was signed, Darrell Barnes or his agents have tried to persuade other BLM employees that Frank Robbins has been in violation of the terms of that settlement agreement.

RESPONSE: Defendant respectfully objects to this request for admission as not reasonably calculated to lead to the discovery of admissible evidence. Defendant further respectfully objects to this request for admission as irrelevant and immaterial to the issues of this litigation.

11. Please admit that Darrell Barnes or his agents sought an investigation of the legality of the settlement agreement signed by the BLM and Frank Robbins.

RESPONSE: Defendant respectfully objects to this request for admission as not reasonably calculated to lead to the discovery of admissible evidence. Defendant further respectfully objects to this request for admission as irrelevant and immaterial to the issues of this litigation

12. Please admit that YOU OR ANYONE ACTING ON YOUR BEHALF have provided documents to John Marvel or Western Watershed Project related to Frank Robbins.

RESPONSE: The Bureau of Land Management has provided documents pursuant to a Freedom of Information Act request. Western Watershed staff have visited the Worland office on more than one occasion, and reviewed information in the official records available to the general public. Water Watershed Project has requested and been granted status as an Interested Party under the regulations contained in 43CFR Part 4100 for all grazing allotments under the jurisdiction of the Worland Field Office. An Interested Party is on the mailing list for all decisions relating to public lands in the Worland Field Office jurisdiction.

13. Please admit that YOU OR ANYONE ACTING ON YOUR BEHALF have provided documents to PEER and/or its officers or directors related to Frank Robbins.

RESPONSE: Deny.

14. Please admit that YOU OR ANYONE ACTING ON YOUR BEHALF have provided documents to the Humane Society of the United States, and/or its officers or directors related to Frank Robbins.

RESPONSE: The Bureau of Land Management has provided public records which are generally available to the public.

15. Please admit that YOU OR ANYONE ACTING ON YOUR BEHALF have provided documents to the Center for Biological Diversity and/or its officers or directors related to Frank Robbins.

RESPONSE: Deny.

16. Please admit that YOU OR ANYONE ACTING ON YOUR BEHALF have provided documents to the Natural Resources Defense Council and/or its officers or directors related to Frank Robbins.

RESPONSE: Deny.

DATED this 27<sup>th</sup> day of August, 2003.

MATTHEW H. MEAD  
United States Attorney

By:

THOMAS D. ROBERTS  
Assistant United States Attorney

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing DEFENDANT DARRELL BARNES RESPONSE TO PLAINTIFF'S COMBINED WRITTEN DISCOVERY INTERROGATORIES - REQUESTS FOR PRODUCTION - REQUEST FOR ADMISSIONS was served upon the following, by the method(s) indicated below on the 26<sup>th</sup> day of August, 2003.

Thomas R. French (w/enc.)  
Thomas R. French, P.C.  
125 South Howes Street, Suite 401  
Fort Collins, Colorado 80521

☐ By Facsimile - 970 - 482 - 3148  
☒ By U.S. Mail - postage prepaid  
☐ By Hand Delivery  
☐ By Overnight Courier

Budd-Falen Law Offices, P.C. (w/o enc.)  
P.O. Box 346  
Cheyenne, WY 82003-0346

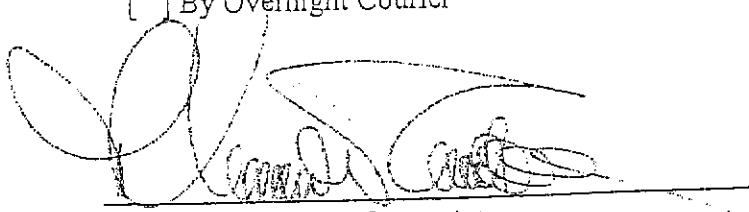
☐ By Facsimile 637-3891  
☒ By U.S. Mail - postage prepaid  
☐ By Hand Delivery  
☐ By Overnight Courier

Thomas R. Graf, Attorney (w/o enc.)  
Office of General Counsel  
U.S. Department of Interior  
755 Parfet Street, Suite 151  
Lakewood, CO 80215

☐ By Facsimile  
☒ By U.S. Mail - postage prepaid  
☐ By Hand Delivery  
☐ By Overnight Courier

Jennifer Rigg, Attorney (w/o enc.)  
Office of General Counsel  
U.S. Department of Interior  
755 Parfet Street, Suite 151  
Lakewood, CO 80215

☐ By Facsimile  
☒ By U.S. Mail - postage prepaid  
☐ By Hand Delivery  
☐ By Overnight Courier

  
\_\_\_\_\_  
Office of the United States Attorney

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

HARVEY FRANK ROBBINS.

vs.

CHARLES WILKIE, individually, and as an employee of the BLM, DARRELL BARNES, individually, and as an employee of the BLM, TERYL SHRYACK, individually, and as an employee of the BLM, PATRICK MERRILL, individually, and as an employee of the BLM, DAVID STIMSON, individually, and as an employee of the BLM, MICHAEL MILLER, individually, and as an employee of the BLM, GENE LEONE, individually, and as an employee of the BLM, and JOHN DOES 1 through 20,

DEPOSITION OF DARRELL BARNES  
VOLUME II OF II  
Taken in behalf of Plaintiff

PURSUANT TO NOTICE, the deposition of

**EXHIBIT**

15

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just

1 to cancel actual-use billing, right? Is that what you  
2 said?

3 A. That's what I said.

4 Q. How long have you been with the BLM?

5 A. Close to 30 years, not counting military.

6 Q. Do you know what actual-use billing is?

7 A. I know there's actual-use billing.

8 Q. What's your understanding of what actual-use  
9 billing is?

10 A. My understanding is that that's a form of  
11 after-the-fact billing.

12 Q. Weren't you involved with meetings with  
13 Mr. Robbins where Mr. Robbins' actual-use billing was  
14 allegedly cancelled by Ms. Shryack and/or Mr. Vessels?

15 A. You know, I don't believe I was in attendance at  
16 any such meetings. I was aware that that was an issue.

17 Q. Yesterday I showed you Exhibit 64-0010, which  
18 consists of a letter from a representative of PEER,  
19 executive director of PEER, to the inspector general,  
20 Department of the Interior and a number of attachments.

So

21 obviously it's a fair assumption that somehow PEER got  
22 ahold of the documents because these documents were  
23 attached to their letter, which was sent to PEER. Do you  
24 know how PEER got the documents -- the BLM documents which  
25 are attached to their letter in Exhibit 64-0010?

171

1 A. No.

2 Q. Have you ever talked with Mr. Wallace about the  
3 documents that were attached to the PEER letter?

4 A. No.

5 Q. Have you --

6 A. I think this is the first time I've ever seen  
7 that PEER letter.

8 Q. Is it of any concern to you that a letter from  
9 PEER to the inspector general contains documents,  
10 memorandums from your office and apparently a letter,  
which  
your  
11 in some situations would be considered privileged from  
12 attorney to an assistant regional solicitor about Frank  
13 Robbins and the settlement agreement? Does that concern  
14 you?

15 A. I think it would concern me.

16 Q. It would make you think that there was a leak of  
17 information which shouldn't be given to private citizens,  
18 correct?

19 A. That's what it looks like, but you know, I have  
20 no knowledge of a source of any of this.

21 Q. And if Mr. Wallace were providing -- if he were,  
22 I'm not saying he did, but I'm saying if Mr. Wallace  
23 provided this copy of the letter from Mr. Roberts to  
24 Mr. Kunz dated August 28, 2002, that would be improper in  
25 your eyes, wouldn't it?

172

1 A. Yeah.

2 Q. And just like giving Mr. Kunz these -- or giving  
3 PEER a copy of the memorandums to John Kunz from David  
4 Wallace would also be improper, wouldn't it?

5 A. I think it would be -- it's improper that  
there's 6 leaks, no matter what the source is.

7 Q. So you'll do an investigation about how this  
8 happened?

9 A. No, I don't intend to. I think that these, as  
an 10 example, these documents are not only in this office, you  
11 know, they were shipped to other offices and, you know,  
12 what the source of any of this information that the people  
13 might gather, reporters and otherwise, who knows? And I  
14 thought about it. I mean, who knows? I can't speculate.

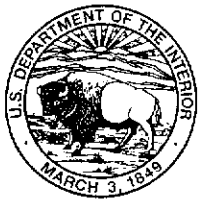
15 Q. And it doesn't concern you enough to do any  
16 investigation?

17 A. You know, what would you investigate? You know,  
18 I'm here in this office. I know those documents have gone  
19 other places, and should I be checking into Tom's office  
office? 20 for, you know, should I be checking into John Kunz'

21 You know, we've got Cheyenne. It's hard to say where the  
broad 22 source of information would have come from. It's too  
23 to be going on some kind of a witch-hunt on.

24 Q. I'll ask my question again, and if you can  
answer 25 my question, that would be helpful, and we can move on.





## United States Department of the Interior

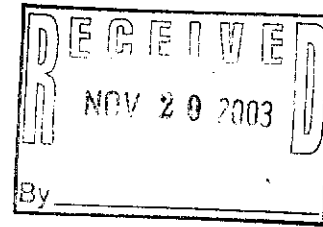
BUREAU OF LAND MANAGEMENT  
Wyoming State Office  
P.O. Box 1828  
Cheyenne, Wyoming 82003-1828

In Reply Refer To:  
FOIA 2003-065

NOV 18 2003

CERTIFIED MAIL--RETURN RECEIPT REQUESTED

Ms. Karen Budd-Falen  
Budd-Falen Law Offices  
P.O. Box 346  
Cheyenne, WY 82003-0346



Dear Ms. Budd-Falen:

We are writing with respect to your Freedom of Information Act (FOIA) request dated September 19, 2003, in which you ask for the following:

"All documents, correspondence, telephone conversation notes, e-mails, photographs, meeting minutes and any other document in your possession dealing with, pertaining to or mentioning Frank Robbins, the High Island Ranch, the HD Ranch and/or the Owl Creek permit transfer."

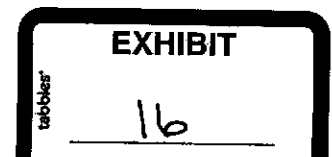
We have completed our search and gathered all responsive materials. Attached are copies of all such records in our possession that were determined to be releasable without legal review. We are in the process of reviewing all remaining responsive records with the Office of the Regional Solicitor, and will provide any additional records cleared for release by the Solicitor as soon as they have completed their review. We will also provide a description of any records withheld from release, and identify the FOIA Exemption upon which the withholding is based. Any fee issues will also be resolved at that time.


We apologize for the delay, and will make every effort to complete our response as quickly as possible. If you have any questions at this time, please contact Craig Wood, FOIA Officer, at 307-635-4713.

Sincerely,

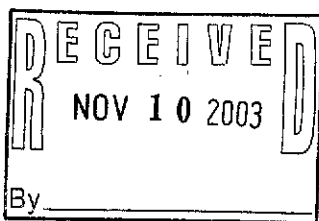
Robert A. Bennett  
State Director

Enclosures



 **COPY**  
DISTRICT OF WYOMING  
CHEYENNE  
2003 NOV -7 PM 3:13

CLERK  
U.S. DISTRICT COURT



THOMAS D. ROBERTS  
Assistant United States Attorney  
STEVEN K. SHARPE  
Assistant United States Attorney  
P.O. Box 668  
Cheyenne, WY 82003-0668  
Telephone: 307-772-2124  
Facsimile: 307-772-2123

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

HARVEY FRANK ROBBINS,

Plaintiff,

v.

No. 98CV201-B

BUREAU OF LAND MANAGEMENT ("BLM"))

DEPARTMENT OF THE INTERIOR, THE

UNITED STATES OF AMERICA, CHARLES

WILKIE, individually and as an employee of

the BLM, DARREL BARNES, individually

and as an employee of the BLM,

TERYL SHRYACK, individually and as an

employee of the BLM, PATRICK MERRILL,

individually and as an employee of the BLM,

DAVID STIMSON, individually and as an

employee of the BLM, MICHAEL MILLER,

individually and as an employee of the BLM,

GENE LEONE, individually and as an employee

of the BLM, and JOHN DOES 1 through 20,

Defendants.

INDIVIDUAL DEFENDANTS' RESPONSE TO PLAINTIFF'S  
MOTION TO COMPEL PRODUCTION OF (AGENCY) DOCUMENTS



**INDIVIDUAL DEFENDANTS' RESPONSE TO PLAINTIFF'S  
MOTION TO COMPEL PRODUCTION OF (AGENCY) DOCUMENTS**

United States of America, on behalf of Charles Wilkie, Darrell Barnes, Teryl Shryack, Michael Miller, and Gene Leone, individually and as employees of the Bureau of Land Management, United States Department of the Interior, through the United States Attorney, District of Wyoming, and Assistant United States Attorneys Thomas D. Roberts and Steven K. Sharpe, herewith respond to the Plaintiff's Motion to Compel Production of Documents.

**INTRODUCTION**

Plaintiff has served four separate requests for production of documents on Defendants. Defendants are all present or former employees of the BLM, and have been sued in their individual capacities. Plaintiff has requested the individually-sued Defendants produce BLM documents and records. Plaintiff previously attempted to obtain these documents from the BLM through a number of FOIA requests on the agency (*see* Plaintiff's Motion at p. 10). The BLM produced numerous documents in response to Plaintiff's FOIA requests, and declined to produce others, asserting such documents were exempt under the various exemptions and exclusions set forth by FOIA. Plaintiff, rather than attempt to exhaust his FOIA appeal remedies, immediately sought to obtain the exempt documents from the individually-sued BLM employees in this case by means of a request for production of documents (*see* Exhibit 8 attached to Plaintiff's Motion to Compel).

On October 14, 2003, Defendants filed their responses to the Plaintiff's various requests and noted the responses sought production of agency records or documents.<sup>1</sup> The responses also noted production of these documents is governed by 43 C.F.R. § 2.80, *et. seq.*

### ARGUMENT

**1. Federal regulations prohibit BLM employees from producing BLM documents or records in cases where the BLM is not a party to the litigation.**

All of the documents which Plaintiff seeks in his various production requests are official BLM documents or records. As this Court noted in its October 7, 2003, order, the BLM is not a party to this litigation.<sup>2</sup> Accordingly, this Court has ruled discovery in this lawsuit is governed by the regulations found in 43 C.F.R. § 2.80, *et. seq.*, and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

---

<sup>1</sup> Plaintiff submitted to Defendants four separate document requests - "Plaintiff's Supplemental Request for Production of Documents" dated August 29, 2003; two requests entitled "Plaintiff's Second Supplemental Request for Production of Documents" and "Plaintiff's Third Supplemental Request for Production of Documents" dated September 11, 2003; and "Plaintiff's Fourth Supplemental Request for Production of Documents" dated September 19, 2003. Counsel for Defendants, by letter to Plaintiff's counsel dated September 26, 2003, indicated Defendants would respond to the first three requests on or before October 14<sup>th</sup> which meant the response to the "supplemental" request would be a few days beyond the usual 30-day response time frame. Counsel for Defendants received no objection from Plaintiff. All four responses were ultimately filed on October 14<sup>th</sup>.

<sup>2</sup> The position of the Bureau of Land Management, through the Office of the Solicitor, Department of Interior, is that any discovery request for production of agency documents is covered by the Department *Touhy* regulations. See attached letter dated November 7, 2003.

43 C.F.R. § 2.81 governs the production of BLM records in cases, like the present, where the BLM is not a party to the litigation. Section 2.81 provides in pertinent part:

Section 2.81. What is the Department's policy on granting requests for employee testimony or Department records?

(c)(a) Except for proceedings covered by § 2.80(c) and (d), it is the Department's general policy not to allow its employees to testify or produce Department records either upon request or by subpoena. . . .

(b) **No Department employee may testify or produce records** in any proceeding in which this subpart applies unless authorized by the Department under §§ 2.80 through 2.90, *United States, ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)(emphasis added).

Federal regulations expressly preclude the individually sued BLM employees in this case from producing agency documents or records. The regulations also require a party making a request for agency records follow the "*Touhy* process" and the specific procedures set forth in §2.80 et. seq. A copy of the federal regulations which govern discovery and the production of agency records in this case are attached to this response.

Plaintiff concedes he is attempting to obtain agency documents and records, and further concedes he has not followed the pertinent regulations governing the discovery of BLM documents. Plaintiff nevertheless asks this court to disregard those regulations, and order the individually sued employees to produce the agency documents in direct contravention of applicable federal law.

Resolution of this issue is controlled by the holding in *United States, ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) and its progeny. In *Touhy*, the Supreme Court recognized the authority of an agency to restrict discovery in a case where the agency is not a party, and to decline to produce

records in reliance on a properly promulgated agency regulation. The Tenth Circuit has followed the dictates of *Touhy* in a number of decisions. For example, in *Saunders v. Great Western Sugar Co.*, 396 F.2d 794, 795 (10th Cir. 1968), the court followed the *Touhy* doctrine and refused to compel the Small Business Association (SBA), an agency of the United State Government, to respond to a subpoena duces tecum since the SBA was not a party to the lawsuit. *See also United States Steel Corp. v. Mattingly*, 663 F.2d 68 (10<sup>th</sup> Cir. 1980)(following *Touhy* in case where trial court stayed enforcement of subpoena served on the Bureau of Standards); *See also Boron Oil Co. v. Downie*, 873 F.2d 67, 69-71 (4th Cir. 1989) (“*Touhy* is part of an unbroken line of authority which directly supports the contention that a federal employee may not be compelled to obey a subpoena contrary to his federal employer’s instructions under valid agency regulations.”).

The federal regulations at issue in this case were promulgated in accordance with the legal authority, recognized in *Touhy*, that federal agencies have to regulate and limit discovery in cases, like the present, where the agency is not a party to the lawsuit. The federal regulations clearly prohibit the individually sued Defendants from producing the documents requested. *See* 43 C.F.R. § 2.81. The federal regulations further provide the Plaintiff must make an appropriate *Touhy* request for the documents upon the agency, and not seek the documents from the individually sued employees. *See* 43 C.F.R. §2.87 through 2.89.

Plaintiff’s argument the regulations cited above somehow do not apply because the agency provided copies of the documents in question to the United States Attorney Office is without merit. The United States Attorney’s Office, in conjunction with the Solicitor’s Office, routinely provides legal assistance and legal advise to the BLM in litigation matters. A party or an agency clearly does

not waive any rights (or relinquish its responsibilities under federal regulations) simply by providing documents to attorneys for review and advise on legal matters. *See generally Frontier Refining Inc., v. Gorman-Rupp Co.*, 136 F.3d 695 (10<sup>th</sup> Cir. 1998).

Similarly, no merit exists for Plaintiff's suggestion that validly enacted regulations should be disregarded whenever an agency, its employees, and their attorneys legally have access to the agency documents the Plaintiff is seeking. Plaintiff's argument that "fundamental injustice" would result if the individual Defendants are not compelled to produce these documents is totally without merit. Plaintiff fails to cite any case law which supports his contention. Moreover, Plaintiff apparently wants this Court to ignore the important fact he is not foreclosed from seeking the documents in question through legal means. Plaintiff can legally seek to obtain the agency documents through other avenues, either by properly complying with the *Touhy* regulations, or by seeking a review of the agencies action under FOIA. *See* 5 U.S.C. §552 (a)(4)(B).

Nor is there any merit to Plaintiff's claim the federal regulations should be ignored because the BLM and the Defendants previously provided Plaintiff with agency documents in prior requests. Once again, Plaintiff fails to cite any legal authority to support his contention. Whether or not the agency may have previously released agency documents to Plaintiff is irrelevant to the issue of whether the regulations should be disregarded with respect to Plaintiff's present requests. Courts have held an agency decision to voluntarily release certain classified or exempted documents does not result in a general waiver or relinquishment of its right to refuse to disclose other documents. *See Mobil Oil Co. v. United States Environmental Protection Agency*, 879 F.2d 698, 700-702 (9<sup>th</sup> Cir. 1989)(EPA did not waive right to invoke statutory exemptions under FOIA by its release of related

documents to the requester and third party.); *Stein v. Dept. of Justice*, 662 F.2d 1245, 1259 (7<sup>th</sup> Cir. 1981)("[b]y exercising its discretion to make public some classified documents, [the government] does not waive any right it has to withhold other properly classified documents of a similar nature").

The Court in *Mobil Oil* explained the public policy rationale for refusing to impose a general waiver or relinquishment of rights on the government in these circumstances.

... [A]n agencies release of certain documents in a litigation environment does not necessarily waive any applicable exemption as to other documents. Implying such a waiver could tend to inhibit agencies from making any disclosures other than those explicitly required by law because voluntary release of documents exempt from disclosure requirements would expose other documents in the litigation to risk of disclosure.

*Mobil Oil*, 879 F.2d at 701.

No merit exists to Plaintiff's claim the individual employees in this case should be compelled to produce agency documents in direct contravention of the applicable federal regulations. Plaintiff's motion to compel must be denied.

**2. Plaintiff is improperly attempting to circumvent FOIA and the FOIA appeal process with his discovery requests.**

Another important justification exists for requiring Plaintiff to properly request these documents from the agency and not the individual employees. Plaintiff is plainly seeking to do an "end run" around FOIA and the FOIA appeal process. Plaintiff previously attempted to obtain all of these documents from the BLM by making a number of FOIA requests on the agency (*see* Plaintiff's Motion at p. 10). The BLM produced numerous documents in response to Plaintiff's FOIA requests, and refused to produce other documents, claiming they were exempt under the various



exemptions and exclusions set forth FOIA. *See* 5 U.S.C. §522 (b)(1)-(9).<sup>3</sup> Rather than attempt to exhaust his FOIA appeal remedies<sup>4</sup>, Plaintiff immediately sought to obtain the exempted documents from the individually-sued BLM employees in this case by means of a request for production of documents (*see* Exhibit 8 attached to Plaintiff's Motion to Compel).

Plaintiff's improper attempt to circumvent FOIA and the FOIA appeal process should not be condoned by the Court. The BLM has previously determined many of the documents which Plaintiff is seeking are privileged and exempt from production under FOIA. The agency clearly has an interest in asserting any privilege which the agency believes may validly apply to the documents which the Plaintiff is requesting, such as an agency attorney client privilege or a claim that the documents are exempt from production under the deliberative process privilege. The agency further has an obligation to assure it does not release financial records of third parties or violate the dictates of the Privacy Act in releasing the documents which the Plaintiff is seeking. These privileges and decisions must be exercised by the agency; not the individual defendants. Plaintiff's attempt to circumvent the FOIA process by seeking these documents from the individual employees is clearly inappropriate.

---

<sup>3</sup>The documents that the BLM claimed were exempt from production are generally referred to as the "pink slipped" documents.

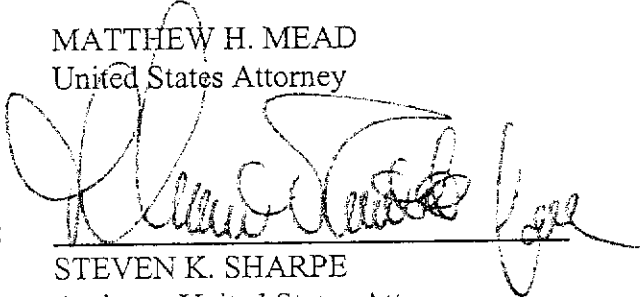
<sup>4</sup>5 U.S.C. §552 (a)(4)(B) provides the appropriate remedy for a party that is claiming that a federal agency improperly withheld agency records in a FOIA request. The statute provides the party with the opportunity to file a complaint in federal court, and also provides the agency with the opportunity to answer.

WHEREFORE, for the foregoing reasons, the Defendants request the Court deny Plaintiff's Motion to Compel, and require Plaintiff to comply with the pertinent federal regulations for obtaining the documents he is seeking.

DATED this 17th day of November, 2003.

MATTHEW H. MEAD  
United States Attorney

By:

  
STEVEN K. SHARPE  
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify on the 24 day of November, 2003, I served a true and correct copy of the foregoing **INDIVIDUAL DEFENDANTS RESPONSE TO PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF (AGENCY) DOCUMENTS** upon the following, by the method(s) indicated below.

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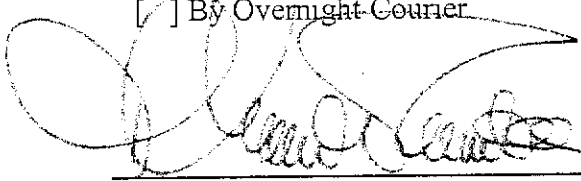
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UNITED STATES ATTORNEY'S OFFICE

C

CODE OF FEDERAL REGULATIONS  
TITLE 43--PUBLIC LANDS: INTERIOR  
SUBTITLE A--OFFICE OF THE SECRETARY  
OF THE INTERIOR  
PART 2--RECORDS AND TESTIMONY;  
FREEDOM OF INFORMATION ACT  
SUBPART H--LEGAL PROCESS: TESTIMONY  
BY EMPLOYEES AND PRODUCTION OF  
RECORDS  
GENERAL INFORMATION  
Current through October 21, 2003; 68 FR 60046

§ 2.80 What does this subpart cover?

(a) This subpart describes how the Department of the Interior (including all its bureaus and offices) responds to requests or subpoenas for:

(1) Testimony by employees in State, territorial or Tribal judicial, legislative or administrative proceedings concerning information acquired while performing official duties or because of an employee's official status;

(2) Testimony by employees in Federal court civil proceedings in which the United States is not a party concerning information acquired while performing official duties or because of an employee's official status;

(3) Testimony by employees in any judicial or administrative proceeding in which the United States, while not a party, has a direct and substantial interest;

(4) Official records or certification of such records for use in Federal, State, territorial or Tribal judicial, legislative or administrative proceedings.

(b) In this subpart, "employee" means a current or former Department employee, including a contract or special government employee.

(c) This subpart does not apply to:

(1) Congressional requests or subpoenas for testimony or records;

(2) Federal court civil proceedings in which the

United States is a party;

(3) Federal administrative proceedings;

(4) Federal, State and Tribal criminal court proceedings;

(5) Employees who voluntarily testify, while on their own time or in approved leave status, as private citizens as to facts or events that are not related to the official business of the Department. The employee must state for the record that the testimony represents the employee's own views and is not necessarily the official position of the Department. See 5 CFR §§ 2635.702(b), 2635.807 (b).

(6) Testimony by employees as expert witnesses on subjects outside their official duties, except that they must obtain prior approval if required by § 2.90.

(d) This subpart does not affect the rights of any individual or the procedures for obtaining records under the Freedom of Information Act (FOIA), Privacy Act, or statutes governing the certification of official records. The Department FOIA and Privacy Act regulations are found at 43 CFR Part 2, subparts B and D.

(e) Nothing in this subpart is intended to impede the appropriate disclosure under applicable laws of Department information to Federal, State, territorial, Tribal, or foreign law enforcement, prosecutorial, or regulatory agencies.

(f) This subpart only provides guidance for the internal operations of the Department, and neither creates nor is intended to create any enforceable right or benefit against the United States.

< General Materials (GM) - References,  
Annotations, or Tables >

43 C. F. R. § 2.80

43 CFR § 2.80

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS  
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Current through October 21, 2003; 68 FR 60046

§ 2.81 What is the Department's policy on granting requests for employee testimony or Department records?

(a) Except for proceedings covered by § 2.80(c) and (d), it is the Department's general policy not to allow its employees to testify or to produce Department records either upon request or by subpoena. However, if you request in writing, the

Department will consider whether to allow testimony or production of records under this subpart. The Department's policy ensures the orderly execution of its mission and programs while not impeding any proceeding inappropriately.

(b) No Department employee may testify or produce records in any proceeding to which this subpart applies unless authorized by the Department under §§ 2.80 through 2.90 United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).

<General Materials (GM) - References,  
Annotations, or Tables>

43 C. F. R. § 2.81

43 CFR § 2.81

END OF DOCUMENT

C

CODE OF FEDERAL REGULATIONS  
TITLE 43--PUBLIC LANDS: INTERIOR  
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Current through October 21, 2003; 68 FR 60046

§ 2.82 How can I obtain employee testimony or Department records?

(a) To obtain employee testimony, you must submit:

(1) A written request (hereafter a "Touhy Request;" see § 2.84 and United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951)); and

(2) A statement that you will submit a check for costs to the Department of the Interior, in accordance with § 2.85, if your Touhy Request is granted.

(b) To obtain official Department records, you must submit:

(1) A Touhy Request; and

(2) A Statement that you agree to pay the costs of duplication in accordance with 43 CFR Part 2,

appendix A, if your Touhy Request is granted.

(c) You must send your Touhy Request to:

(1) The employee's office address;

(2) The official in charge of the employee's bureau, division, office or agency; and

(3) The appropriate unit of the Solicitor's Office.

(d) To obtain employee testimony or records of the Office of Inspector General, you must send your Touhy Request to the General Counsel for the Office of Inspector General.

(e) 43 CFR Part 2, Appendix B contains a list of the addresses of the Department's bureaus and offices and the units of the Solicitor's Office. The General Counsel for the Inspector General is located at the address for the Office of the Inspector General. If you do not know the employee's address, you may obtain it from the employee's bureau or office.

<General Materials (GM) - References,  
Annotations, or Tables>

43 C. F. R. § 2.82

43 CFR § 2.82

END OF DOCUMENT

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Current through October 21, 2003; 68 FR 60046

§ 2.83 If I serve a subpoena duces tecum, must I  
also submit a Touhy request?

Yes. If you serve a subpoena for employee  
testimony, you also must submit a request under  
United States ex rel. Touhy v. Regan, 340 U.S. 462  
(1951)? If you serve a subpoena duces tecum for  
records in the possession of the Department, you  
also must submit a Touhy Request.

< General Materials (GM) - References,  
Annotations, or Tables >

43 C. F. R. § 2.83

43 CFR § 2.83

END OF DOCUMENT

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Current through October 21, 2003; 68 FR 60046

§ 2.84 What information must I put in my Touhy Request?

Your Touhy Request must:

- (a) Identify the employee or record;
- (b) Describe the relevance of the desired testimony or records to your proceeding and provide a copy of the pleadings underlying your request;
- (c) Identify the parties to your proceeding and any

known relationships they have to the Department's mission or programs;

(d) Show that the desired testimony or records are not reasonably available from any other source;

(e) Show that no record could be provided and used in lieu of employee testimony;

(f) Provide the substance of the testimony expected of the employee; and

(g) Explain why you believe your Touhy Request complies with § 2.88.

<General Materials (GM) - References,  
Annotations, or Tables>

43 C. F. R. § 2.84

43 CFR § 2.84

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Current through October 21, 2003; 68 FR 60046

§ 2.85 How much will I be charged?

We will charge you the costs, including travel

expenses, for employees to testify under the relevant substantive and procedural laws and regulations. You must pay costs for record production under 43 CFR Part 2, Appendix A. Costs must be paid by check or money order payable to the Department of the Interior.

< General Materials (GM) - References,  
Annotations, or Tables >

43 C. F. R. § 2.85

43 CFR § 2.85

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Current through October 21, 2003; 68 FR 60046

§ 2.86 Can I get an authenticated copy of a  
Department record?

Yes. We may provide an authenticated copy of a  
Department record, for purposes of admissibility  
under Federal, State or Tribal law. We will do this  
only if the record has been officially released or  
would otherwise be released under § 2.13 or this  
Subpart.

<General Materials (GM) - References,  
Annotations, or Tables>

43 C. F. R. § 2.86

43 CFR § 2.86

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Current through October 21, 2003; 68 FR 60046

§ 2.87 How will the Department process my Touhy Request?

(a) The appropriate Department official will decide whether to grant or deny your Touhy Request. Our Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, may negotiate with you or your attorney to refine or limit both the timing and content of your Touhy Request. When necessary, the Solicitor's Office or, in the case of the Office of Inspector General, its General

Counsel, also will coordinate with the Department of Justice to file appropriate motions, including motions to remove the matter to Federal court, to quash, or to obtain a protective order.

(b) We will limit our decision to allow employee testimony to the scope of your Touhy Request.

(c) If you fail to follow the requirements of this Subpart, we will not allow the testimony or produce the records.

(d) If your Touhy Request is complete, we will consider the request under § 2.88.

<General Materials (GM) - References,  
Annotations, or Tables>

43 C. F. R. § 2.87

43 CFR § 2.87

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Current through October 21, 2003; 68 FR 60046

§ 2.88 What criteria will the Department consider in responding to my Touhy Request?

In deciding whether to grant your Touhy Request, the appropriate Department official will consider:

(a) Your ability to obtain the testimony or records from another source;

(b) The appropriateness of the employee testimony and record production under the relevant regulations of procedure and substantive law, including the FOIA or the Privacy Act; and

(c) Our ability to:

- (1) Conduct our official business unimpeded;
- (2) Maintain impartiality in conducting our business;
- (3) Minimize the possibility that we will become involved in issues that are not related to our mission or programs;
- (4) Avoid spending public employee's time for private purposes;
- (5) Avoid the negative cumulative effect of granting similar requests;
- (6) Ensure that privileged or protected matters remain confidential; and
- (7) Avoid undue burden on us.

< General Materials (GM) - References,  
Annotations, or Tables >

43 C. F. R. § 2.88

43 CFR § 2.88

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§ 2.89 What must I, as an employee, do upon receiving a request?

(a) If you receive a request or subpoena that does not include a Touhy Request, you must immediately notify your supervisor and the Solicitor's Office, or the General Counsel of the Office of the Inspector General, as applicable, for assistance in issuing the proper response.

(b) If you receive a Touhy Request, you must promptly notify your supervisor and forward the request to the head of your bureau, division or office. After consulting with the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, the official in charge will decide whether to grant the Touhy Request under § 2.88.

(c) All decisions granting or denying a Touhy

Request must be in writing. The official in charge must ask the applicable unit of the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, for advice when preparing the decision.

(d) Under 28 U.S.C. 1733, Federal Rule of Civil Procedure 44(a)(1), or comparable State or Tribal law, a request for an authenticated copy of a Department record may be granted by the person having the legal custody of the record. If you believe that you have custody of a record:

(1) Consult your delegated authority to determine if you can grant a request for authentication of records; and

(2) Consult the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, concerning the proper form of the authentication (as authentication requirements may vary by jurisdiction).

<General Materials (GM) - References,  
Annotations, or Tables>

43 C. F. R. § 2.89

43 CFR § 2.89

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Current through October 21, 2003; 68 FR 60046

§ 2.90 Must I get approval before testifying as an expert witness on a subject outside the scope of my official duties?

(a) You must comply with 5 CFR 2635.805(c), which details the authorization procedure for an employee to testify as an expert witness, not on behalf of the United States, in any judicial or administrative proceeding in which the United States is a party or has a direct and substantial interest. This procedure means:

(1) You must obtain the written approval of your

Deputy Ethics Official;

(2) You must be in an approved leave status if you testify during duty hours; and

(3) You must state for the record that you are appearing as a private individual and that your testimony does not represent the official views of the Department.

(b) If you testify as an expert witness on a matter outside the scope of your official duties, and which is not covered by paragraph (a) of this section, you must comply with 5 CFR 2635.802 and 5 CFR 3501.105.

< General Materials (GM) - References,  
Annotations, or Tables >

43 C. F. R. § 2.90

43 CFR § 2.90

END OF DOCUMENT



## United States Department of the Interior

### OFFICE OF THE SOLICITOR

Rocky Mountain Region  
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November 7, 2003

Thomas D. Roberts  
Assistant U.S. Attorney  
District of Wyoming  
P.O. Box 668  
Cheyenne, WY 82003-0668

Re: *Harvey Frank Robbins v. Bureau of Land Management, et al.*  
USDC-WY-98CV201B; USAtty-WY-1998V00106

Dear Mr. Roberts:

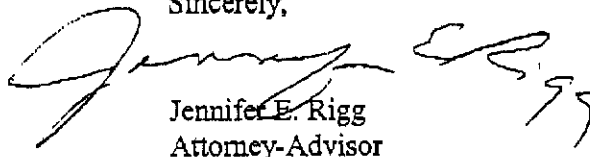
The Bureau of Land Management's position is that any discovery request for production of Agency documents in the above-referenced case is covered by the Department's regulations at 43 C.F.R. Part 2, Subpart E, Legal Process: Testimony by Employees and Production of Records. Those regulations govern all requests or subpoenas for, among other things, official records for use in Federal judicial proceedings and are often referred to as the *Touhy* regulations (based on the case of *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)).

Since the Department of the Interior is not a party to the above-referenced case, the individual Defendants are prohibited from producing records unless authorized by the Department under the regulations at 43 C.F.R. §§ 2.80 through 2.90. See 43 C.F.R. § 2.81(b).

The responsibilities of any *Touhy* requester are clearly set forth in the regulations at 43 C.F.R. §§ 2.82 through 2.86.

The *Touhy* regulations do not affect the rights of any individual to obtain records under the Freedom of Information Act or the Privacy Act. E.g. 43 C.F.R. § 2.80(d).

Sincerely,



Jennifer E. Rigg  
Attorney-Advisor

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BEFORE THE  
UNITED STATES DEPARTMENT OF INTERIOR  
OFFICE OF HEARINGS AND APPEALS  
TRANSCRIPT OF PROCEEDINGS

-----X  
H. FRANK ROBBINS, JR., : 08:06:19  
and : 08:06:19  
HIGH ISLAND RANCH AND : 08:06:26  
CATTLE COMPANY, : DOCKET Nbrs. 08:06:31  
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: WY-01-98-2, and 08:06:47  
vs : WY-01-99-2 08:06:56  
: 08:06:56  
BUREAU OF LAND MANAGEMENT, :  
Respondent. :  
-----X

HEARING

BEFORE:  
HONORABLE HARVEY C. SWEITZER  
United States Administrative Law Judge

May 15, 2001  
Worland, Wyoming USA

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EXHIBIT

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BEFORE THE  
UNITED STATES DEPARTMENT OF INTERIOR  
OFFICE OF HEARINGS AND APPEALS  
TRANSCRIPT OF PROCEEDINGS

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and :  
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CATTLE COMPANY, : DOCKET Nbrs.  
Appellants, : IBLA 98-404 R;  
: WY-01-98-2, and  
vs : WY-01-99-2  
BUREAU OF LAND MANAGEMENT, :  
Respondent. :  
-----X

HEARING

BEFORE:  
HONORABLE HARVEY C. SWEITZER  
United States Administrative Law Judge

September 25, 2001  
Worland, Wyoming USA  
Day 5

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18	Patrick Solyman Merrill	
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21	Direct	847, 872
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22	Cross	876
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I N D E X		(Continued)		
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4	Joseph Vessels			
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7	Dennis Grasso			
8	Direct by Jensen	1327, 1349		
	Voir Dire	1346		
9	H. Frank Robbins			
10	Direct by Jensen	1427		
11	EXHIBITS MARKED BY THE APPELLANT:			
	Number	Description	Marked	Offered Received
13	A-111	Photopy Memo dtd 18 Feb 88	--	1005 1132
14	A-112	Photopy ltrhd BLM to G. Nelson, sgnt J. Vessels	--	1132 1133
15				09:42:33
16				09:42:33
17	A-113	Photopy dcmt, Non-exclusive Road Easement fm. G. Nelson dtd 18 Mar 94	--	1133 1135
18				09:43:40
19				09:43:42
20				09:43:48
21	A-114	Photopy ltrhd BLM dtd 08 Apr 94 to High Island Ranch sgnt J. Vessels	--	1136 1136
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23				09:47:21
24				09:47:21
25				09:47:23
	A-115	Photopy dcmt, Warranty Deed to F. Robbins fm G. Nelson re High Island Ranch dtd May 94	--	1138 1138
				09:49:33
				09:49:34
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				09:49:43
				09:49:43
	A-116	Photopy ltrhd BLM to F. Robbins dtd 08 June 94, sgnt J. Vessels	--	1139 1139
				09:51:25

TDR

SEP 10 AM 9:01

U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

HARVEY FRANK ROBBINS, and the  
HIGH ISLAND RANCH and CATTLE  
COMPANY,

Plaintiffs,

vs.

UNITED STATES BUREAU OF LAND  
MANAGEMENT, an Agency of the  
United States Department of the Interior,  
GALE NORTON, Secretary of the United  
States Department of the Interior; AL  
PIERSON, in his official capacity as  
Director of Wyoming State Bureau of Land  
Management; NINA ROSE HATFIELD,  
in her official capacity as Acting Director of  
Bureau of Land Management; DARRELL  
BARNES, in his official capacity as Field  
Manager of the Worland Field Office for  
the Bureau of Land Management,

Defendants.

Karen

307-637-3891

Case No. 01-CV-158-D

ORDER ON APPLICATION FOR AN AWARD OF ATTORNEY'S FEES AND COSTS

This matter comes before the Court on Defendants' Motion to Dismiss and on Plaintiff's Application for an Award of Attorney's Fees and Litigation Costs Pursuant to the Freedom of Information Act. The Court, having considered the materials submitted by the parties, having heard oral argument from counsel and being otherwise fully advised in the premises, FINDS and ORDERS as follows:

ENTERED  
ON THE DOCKET  
10 SEP 02  
(Date)  
Betsy A. Glase, Clerk  
By Marie A. Glase  
Deputy Clerk

EXHIBIT

tabbies

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#### BACKGROUND

Between May 22, 2001 and June 29, 2001, the Plaintiff made six separate requests for information to the Bureau of Land Management ("BLM"), pursuant to the Freedom of Information Act ("FOIA") and applicable BLM regulations. Under FOIA, the BLM had until June 22, 2001, and pursuant to the BLM regulations it had until June 8, 2001, to respond to the Plaintiff's first request.

On September 5, 2001, after the BLM failed to respond to any of the six FOIA requests, the Plaintiff filed a complaint, pursuant to 5 U.S.C. § 552(a)(4)(B), to compel the BLM to comply with the requests. After this litigation was filed, the BLM finally decided to respond to the Plaintiff's requests. Curiously, the Plaintiff's attorneys received the BLM's FOIA responses on the very day that the trial for which some of the information was being sought began.

On October 10, 2001, the Defendants' filed a Motion to Dismiss, stating that the Plaintiff's claims were moot because the BLM had fully and completely responded to each of the FOIA requests. In response, Plaintiff agreed that his claims were moot in light of the BLM's compliance. *Anderson v. United States Dept. of Health and Human Serv.*, 3 F.3d 1383, 1384 (10<sup>th</sup> Cir. 1993). However, Plaintiff contends that he is still entitled to an award of attorney's fees and litigation costs.

#### DISCUSSION

The statutory basis for an award of attorney fees and litigation costs under FOIA is 5 U.S.C. § 552(a)(4)(E) which provides: "The court may assess against the United States

reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." The Tenth Circuit Court of Appeals has stated that "[a] plaintiff has 'substantially prevailed' in a FOIA case if the lawsuit was reasonably necessary and substantially caused the requested records to be released." *Gowan v. United States Dept. of Air Force*, 148 F.3d 1182, 1195 (10<sup>th</sup> Cir. 1998) (citing *Chesapeake Bay Found., Inc. v. Dept. of Agriculture*, 11 F.3d 211, 216 (D.C. Cir. 1993)). Plaintiff argues that, applying these considerations, he is eligible for an award of attorney's fees because it was the lawsuit that prompted the agency to respond to his requests. Plaintiff contends that his eligibility is not dependent on this Court having ordered the BLM to provide the information requested. On this point, Plaintiff relies primarily on *Cox v. United States Dept. of Justice*, 601 F.2d 1 (D.C. Cir. 1979).

The Supreme Court has recently analyzed the definition of "prevailing party" as used in various fee-shifting statutes as the basis for an award of attorney fees and costs. In *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001), the Court held that the "catalyst theory" – which posits that a plaintiff is a "prevailing party" if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct – "is not a permissible basis for the award of attorney's fees under the FHAA ... and ADA ...." *Id.* at 610. In reaching this holding, the Court recognized that "Congress ... has authorized the award of attorney's fees to the 'prevailing party' in numerous statutes in addition to those at issue here ...." *Id.* at 602.

In designating those parties eligible for an award of litigation costs, Congress employed the term "prevailing party," a legal term of art. Black's Law Dictionary 1145 (7<sup>th</sup> ed. 1999) defines "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded . . . ." This view that a "prevailing party" is one who has been awarded some relief by the court can be distilled from our prior cases.

*Buckhannon*, 532 U.S. at 603.

The *Buckhannon* court determined that the "catalyst theory" improperly allows an award "where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605.

Finding that "eligibility for an award of attorney's fees in a FOIA case should be treated the same as eligibility determinations made under other fee-shifting statutes," the D.C. Circuit Court of Appeals very recently determined that *Buckhannon's* rejection of the catalyst theory applies to a request for attorney's fees under FOIA. *Oil, Chemical and Atomic Workers Int'l Union v. Dept. of Energy*, 288 F.3d 452, 455 (D.C. Cir. 2002).<sup>1</sup>

It is true . . . that *Buckhannon* treated "prevailing party" as a legal term of art." 532 U.S. at 603. Yet all must agree that a "prevailing party" and a "party who prevails" are synonymous. FOIA's addition of the modifier "substantially" might possibly be taken as limiting the category of "prevailing parties," but it cannot be taken as expanding the universe of parties eligible for a fee award. To put this in concrete terms, a FOIA plaintiff may seek thousands of documents but wind up with a judgment providing only a handful of insignificant documents. One might say this plaintiff was a prevailing party, but nevertheless not say that the plaintiff substantially prevailed. . . . We have seen nothing to suggest that Congress sought to draw any fine distinction between "prevailing party" and "substantially prevail." . . . Consistent with our practice (and the Supreme Court's) of viewing the various fee-shifting statutes as interchangeable, we have in the past treated the

<sup>1</sup> The court acknowledged that, prior to *Buckhannon*, it had followed the "catalyst theory," citing to *Chesapeake Bay Found., Inc., supra* (cited by Tenth Circuit Court of Appeals in *Gowan*) and *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1364 (D.C. Cir. 1977) (cited by Plaintiff's counsel). The court determined that "[b]ecause *Buckhannon* controls, the existing law of our circuit must give way." 288 F.3d at 457.

"substantially prevail" language in FOIA as the functional equivalent of the "prevailing party" language found in other statutes. . . ."  
*Id.* at 455-56.

The Court further dismissed arguments that *Buckhannon* is distinguishable because FOIA cases are equitable in nature, and because FOIA's legislative history shows Congress' intention that FOIA's attorney's fee provision be understood differently from comparable provisions in other statutes such as the ADA. *Id.* at 456.

The Court is persuaded by the reasoning set forth in *Oil, Chemical and Atomic Workers Int'l Union*, supporting the D.C. Court of Appeals' holding that *Buckhannon* is applicable to a request for attorneys' fees under FOIA. While there may be some dispute as to whether *Buckhannon* bars attorneys' fees in the absence of a final judgment on the merits or a court-ordered consent decree, *see id.* at 459-64 (Rogers, J. dissenting), *Buckhannon* makes clear that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Buckhannon*, 532 U.S. at 605. Plaintiff is not considered a complainant which has "substantially prevailed" in this action and is not, therefore, eligible for an award of attorneys' fees and costs.


This result should not be interpreted as a condoning of the BLM's conduct in this matter. Arrogance of authority, and indifference to citizens' legitimate interests, even the appearance of such vices, should be avoided by public servants. The BLM's conduct in this matter is troubling to this Court and it will not soon be forgotten. A matter of this nature involving this agency should not appear on my desk again.

THEREFORE, it is hereby

ORDERED that Defendants' Motion to Dismiss is GRANTED and this case is dismissed as moot; it is further

ORDERED that Plaintiff's Application for an Award of Attorney's Fees and Litigation Costs Pursuant to the Freedom of Information Act is DENIED.

DATED this 9th day of September, 2002.

  
United States District Judge